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A

SUMMARY

OF THE

LAW OF TORTS,

OR

Wrongs

INDEPENDENT OF CONTRACT.

BY

ARTHUR UNDERHILL, B.A.,

OF LINCOLN'S INN, ESQUIRE, BARRISTER AT LAW.

Ut corpora sine mente, sic civitas sine lege, suis partibus ut nervis, ac sanguine, et membris, uti non potest. Legum ministri, magistratus; legum interpretes, judices; legum denique idcirco omnes servi sumus, ut liberi esse possimus.—CICERO, *Cluent.*

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PREFACE.

I HAVE been induced to write this Work by the fact, that there is no English Treatise on the Law of Torts, except that of Mr. Addison, which, however excellent as a digest and book of reference, is little fitted for the Student who desires to learn principles before entering into particulars.

To meet the want thus indicated, I have, in the compilation of this Work, avoided matters of detail, and have confined myself chiefly to broad principles. These I have put before the reader in the form of rules, taken in many instances from the dicta of the Judges.

These rules I have illustrated by cases falling under them, and where the rules admit of exceptions they have been succinctly stated.

Where there has appeared to be any ambiguity or obscurity in the terms of a rule, I have endeavoured to explain and elucidate it by means of sub-rules.

The method which I have adopted is, I need scarcely say, not original.

It was, I believe, first introduced by Mr. Powell in his Compendium of Evidence, and afterwards adopted in an improved form by Mr. Hawkins in his Treatise on Wills, and by Mr. Dicey in his Work on Parties to an Action.

In all these Works, but particularly the two latter ones, its superior merit has been conclusively proved.

Although my chief aim has been to write for the Student, yet I think that the Book will be found to be of use to the Practitioner. Especially to the country Solicitor, practising in the County Court, it should be so, as he will here find principles succinctly stated and illustrated, without the trouble of extracting them from a host of isolated cases in a digest or a large treatise. It has also the advantage of extreme portability, which I venture to think is a not unimportant recommendation.

I have not treated of wrongs committed by married persons against each other, for two reasons. Firstly, because they are not, strictly speaking, pure torts, but rather quasi torts arising out of a breach of the marriage contract; and, secondly, because in a small Work like the present it is only possible to treat particularly of those torts which are most ordinarily met with, or which, to use a common phrase,

are of every-day occurrence, and this class is at present happily not so common, although apparently on the increase. Neither have I entered into the subject of bailments; because, however an action upon a bailment may be framed, it is in reality an action arising ex contractu.

I have incorporated the cases cited, in the body of the text, because I thought that by so doing their names would be more likely to be remembered by the Student, than if they were hidden in the mazes of a foot note. A case incorporated in the text becomes part and parcel of the paragraph, and thus has the benefit of the association of ideas to fix it in the memory. A case referred to in a foot note, on the contrary, is very apt to cause mental confusion: besides which, the nuisance of continually jumping, as it were, from one part of a page to another part, to say nothing of the consequent loss of time, is an almost irresistible temptation to many readers to omit reading the names of the cases altogether.

Since I have written the Work the Judicature Bill has become law. That act does not in any particular affect the *law* of torts. It, however, alters the *practice*, inasmuch as it abolishes the distinction between law and equity; therefore, when the act comes into operation, Courts of Law will be able to

give the same relief, which is now peculiar to Courts of Equity. One other great alteration is also made by the act in our jurisprudence by the declaration, that where law and equity conflict, the latter shall prevail. This will not, in my judgment, affect the law of torts, except perhaps in regard to the principles upon which relief is given for infringement of trade-marks, which will be found to be fully noticed in the last chapter.

I must not forget to acknowledge the assistance which I have derived from those valuable works, Addison on Torts, Roscoe's Nisi Prius Evidence, Bullen & Leake's Precedents of Pleading, Stephen's Commentaries, Broom's Commentaries, and Fisher's Common Law Digest. Of the knowledge and learning stored in them I have freely availed myself.

Lastly, I have not attempted, nay, have eschewed literary embellishments. To be clear and concise, and to fit the rules together logically and harmoniously, has been my sole end. Whether I have succeeded in effecting that end it is for my readers to decide.

ARTHUR UNDERHILL.

1, Child's Place, Temple,
August, 1873.

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PART I.

RULES RELATING TO TORTS IN GENERAL.

CHAPTER I.

Of Wrongs purely Ex Delicto.

The Object of Law. "The maxims of law," says Justinian, "are these: to live honestly, to hurt no man, and to give every one his due." The practical object of jurisprudence must necessarily be to enforce the observance of these maxims, which is done by punishing the dishonest, causing wrongdoers to make reparation, and ensuring to every member of the community, the full enjoyment of his rights and possessions.

Public and Private Wrongs. Infractions of law, are, for the purposes of justice, divided into two great classes: viz., public and private wrongs. The former consist of such offences, as aiming at the root of society and order, are considered to be wrongs to the community at large; and as no redress can be given to the community, except by the prevention of such acts for the future, they are visited with some deterrent and exemplary punishment.

Private wrongs, or civil injuries, on the other hand, are such violations or deprivations of the legal rights of another, as are accompanied by either actual or presumptive damage. These being merely in-

juries to private individuals, admit of redress. The law therefore affords a remedy, by forcing the wrong-doer to make reparation.

Division of Private Wrongs. But as wrongs are divided into criminal and civil, so the latter are sub-divided into the two classes, of wrongs ex contractu, and wrongs ex delicto; the former being such as arise out of the violation of private contracts; the latter, commonly called torts, such as spring from infractions of the great social obligation, by which each member of the state is bound to do hurt to no man.

It is of the latter class, that I am about to treat in this work.

Definition of a Tort. A tort is described in the Common Law Procedure Act, 1852, as "a wrong independent of contract;" but I think that a clearer notion of its nature may be gained, by defining it as the infraction of a legal right, or the violation, coupled with consequent damage, of a legal duty. Thus wrongfully to imprison a man is an invasion of a right, but to dig a hole near a public road is a breach of duty, and if a man falls into it and is injured it constitutes a tort.

Cardinal Rule. Perhaps the widest and most important rule of law relating to torts, is summed up in the short sentence,—

RULE 1.—Sic utere tuo ut alienum non lædas.

(*So use your own rights and privileges, as not to invade those of another.*)

(1) Thus I have a general right to excavate my land; but my neighbour has an equal right to lateral support for his; and therefore if in the course of excavating mine, I should cause his to subside, he will have a right of action against me: for although I should be only exercising a lawful right, yet I have no business to exercise it at his expense.

(2) So, too, where one caused hollows to be formed on his land, and water accumulated in them, and thence percolated into the plaintiff's mines, and damaged them, he was held entitled to recover from the person on whose land the hollows were formed (*Smith* v. *Fletcher*, *L. R.*, 7 *Ex.* 305).

(3) So if my neighbour set up an offensive trade, (as a tallow-chandlery or the like,) an action will lie; for 'though it is a lawful trade, and the defendant has a right to exercise it, yet I have an equal right to immunity from disgusting and noxious fumes; and therefore he should carry it on in a remote place, and *sic utere suo ut alienum non lædas* (see *Morley* v. *Pragnel*, *Cro. Car.* 510; *Hole* v. *Barlow*, 4 *C. B., N. S.* 334; 3 *Steph. Comm., Nuisance*).

Mere Damage no Tort. But every loss (or *damnum* as it is technically called) caused by another, is

not necessarily a tort; for it may be, that although a loss has actually resulted, yet no right has been infringed, nor any duty violated, and it is such infringement or violation, which constitutes the wrongful act or *injuria*. It is a rule, therefore, that—

RULE 2.—Ex damno sine injuriâ, non oritur actio.

(*An action will not lie, for a loss unoccasioned by a wrongful act.*)

Thus for example, if a gas company erect a gasometer, whereby a shop is hidden from the view of the public, this although causing a most grievous loss to the shopkeeper, is yet no tort (as there is no injuria or wrongful act); for no man has the right of uninterrupted view of a particular spot, if the land of another intervene; otherwise the owner of such intervening land, would lose his right of building thereon, if his neighbour should build on his first; a manifest absurdity. There was therefore no invasion of a right or violation of a duty (*Butt* v. *Imperial Gas Co.*, *L. R.*, 2 *Ch. App.* 158).

Actual Damage when necessary. But although an action will not lie for a *damnum sine injuriâ*, yet the converse does not hold good in every case.

RULE 3.—A wrongful act, whereby a private right is infringed, requires no proof of

damage; but a wrongful act, whereby a legal duty only is violated, is no tort, unless actual damage has thereby accrued to the plaintiff.

The reason of this rule would seem to be, that the invasion or withholding of another's rights, is a loss or damnum of itself (namely, of that to which he is entitled), and therefore no proof of any further damage is required in such cases. But in breaches of duty, on the contrary, no man can be said to suffer, unless some actual loss or damage is thereby caused to him. Before he can successfully sue another therefore for breach of duty, the law makes him prove that he has actually sustained such damage.

(1) An instance of a tort arising out of the infringement of a right, is afforded by the leading case of *Ashby* v. *White* (*Sm. L. C.*), in which the plaintiff, a voter at an election, recovered damages against the returning officer for wrongfully refusing to record his vote:—Here no actual loss was suffered by the plaintiff, but the law accounted the withholding of his right of voting as an elector, to be an injury, for which a pecuniary reparation was recoverable.

(2) So too, in cases of infringements of copyright, or of patent right, an action will lie without any proof of actual damage.

(3) But on the other hand, where the injuria is a mere breach of duty, a damnum must be proved. Thus where one places an obstruction in a public road, a mere delay or other injury caused to another in common with all persons having occasion to use the road, is no ground for an action (*Winterbottom* v.

Lord Derby, *L. R.*, 2 *Ex.* 316); but it is the subject for a prosecution. If, however, he sustain special damage beyond that sustained by other people, an action lies; as if for instance it should prevent access to his place of business and thereby damage his trade (*Iveson* v. *Moore*, 1 *L. Raym.* 486.)

Doctrine of Probable Consequence. The damage suffered by the plaintiff need not be actually *done by the defendant* in order to render him liable. It is sufficient that it be the natural result of his wrongful act.

RULE 4.—Every man is presumed to intend the probable consequences of his acts.

(1) The leading example of this rule, is the case of *Scott* v. *Shepherd* (3 *Wils.* 403), in which the facts were as follows. The defendant threw a squib on to a stall, the keeper of which in self-defence threw it off again; it then alighted on another stall, was again thrown away, and finally exploding, blinded the plaintiff. Upon these facts, the defendant was held to be liable, the damnum having been the natural result of his injuria.

(2) So if J. S. whip my horse, and it in consequence run away with me, and knock down and injure anyone; J. S. shall answer for it and not I (*Gibbons* v. *Pepper*, 1 *Ld. Raym.* 38).

Remoteness of Damage. The rule, however, is confined to cases where the damnum is the natural and probable consequence of the injuria.

Sub-rule.—*No action lies, where the injuria and damnum are not usually found in sequence, in which case, the damage is said to be too remote.*

Thus it was considered to be too remote, where the manager of a theatre sued the defendant for libelling a singer at his theatre, who was thereby prevented from singing, in consequence of which the plaintiff lost her services (*Haddon* v. *Lott*, 24 *L. J., C. P.* 49).

But if the damage be connected with the wrongful act in a natural sequence, an action lies, no matter how long the intervening chain of circumstances.

Lord Campbell's Act. I may here mention that previously to the passing of this Act (9 & 10 Vict. c. 93), the injury done to the relatives of a person killed by a tort of another, was considered too remote to support an action. By that Act, however, this distinction was abolished, and now when a person's death is caused by the wrongful act, neglect, or default of another, which wrongful act, neglect, or default, is such as would (if death had not ensued) have entitled him to maintain an action and recover damages in respect thereof; then such wrongdoer shall be liable, at the suit of the executor or administrator of the deceased person, to an action for damages for the benefit of the wife, husband, parent, or child, grand parent, step parent, grand child, or step child, of such deceased person; in such shares as the jury may direct.

If there is no executor or administrator of the deceased, or if the executor or administrator refuse or neglect to sue for six calendar months after the death of the deceased, then it may be maintained by any of the above-mentioned relatives (sect. 1).

The action is, however, only maintainable, where the deceased person (had death not ensued) could have maintained it (*Senior* v. *Ward*, 28 *L. J., Q. B.* 139); and it cannot be maintained at all by an illegitimate child (*Dickenson* v. *N. E. R. Co.*, 33 *L. J., Ex.* 91).

Nor can an action be brought if the deceased received compensation for the injury before death resulted from it (*Read* v. *G. E. R. Co., L. R.*, 3 *Q. B.* 555).

Intention to Commit. It is a well-established principle, that want of intention (however important in estimating the damages to be awarded) is no defence to an action for a tort.

Rule 5.—If the damage be the natural result of something wrongfully done or omitted on the part of the defendant, an action will lie, whether the act were intentional or unintentional.

Thus, if in defending myself from another, I lift up my stick and so accidentally hit a third person, he shall have an action against me (*see Scott* v. *Shep-*

herd, 2 *W. Bl.* 894); and so it has been held that no man shall be excused of a trespass, unless it shall be judged utterly without his fault (*Weaver* v. *Ward*, *Hob.* 134).

Torts may therefore arise either from some intentional wrong, as fraud or force, or else from some unintentional but still wrongful conduct, as negligence or (as we have seen before) recklessness.

Fraud and Deceit. A very important class of wilful wrongs, are those arising out of fraud and deceit.

Rule 6.—The principles by which in the administration of justice, the responsibility for the consequences of a false representation is to be ascertained, are these:—

(1) Every man must be held responsible for the consequences of a false representation made by him to another, upon which that other acts, and so acting is injured or damnified (*Pasley* v. *Freeman*, 2 *Sm. L. C.* 71).

(2) Every man must be held responsible for the consequences of a false representation made by him to another, upon which a third person acts, and so acting is injured or damnified; pro-

vided, that such false representation was made with the direct intent, that it should be acted upon by such third person in the manner that occasioned the injury or loss.

(3) The injury must be the immediate and not the remote consequence of the representation (*Barry* v. *Croskey*, 2 *Johns. & H.* 21).

(1) Thus where one falsely represents the amount of his business, in order to induce another to buy it, and the latter does so, an action will lie against the vendor (*Dobell* v. *Stevens*, 3 *B. & C.* 623).

(2) And so one falsely representing the solvency of another, with intent to procure credit for him, (whereby the plaintiff suffers) is liable to make good the damage (*Pontifex* v. *Bignold*, 3 *Sc. N. R.* 390).

(3) So too, where the directors of a bank issue a a false report to shareholders in order to influence the price of the shares, and in consequence of the report, a third party is induced to purchase them, he may sue the directors (*Scott* v. *Dixon*, 29 *L. J., Ex.* 62, *n.*; *Clarke* v. *Dickson*, 28 *L. J., C. P.* 225).

(4) So the imitating of another's trade-mark is actionable, for thereby the plaintiff's customers are induced to buy the fraudulently marked goods, under the impression that they are made by the plaintiff, and the plaintiff consequently looses their custom.

Thus where the plaintiff, an omnibus proprietor, possessed omnibuses with peculiar devices upon them, and the defendant, a rival proprietor, started opposition ones with similar devices, so as to gain the plaintiff's custom, an injunction was granted to restrain him (*Knott* v. *Morgan*, 2 *Keene*, 219).

Meaning of "False." Sub-rule (1) *By a false representation is meant a knowingly untrue one.*

Thus a statement untrue in fact, but made honestly, and in the full belief of its truth, is no fraud (*Chandelor* v. *Lopus*, 1 *Sm. L. C.* 165; *Collins* v. *Evans*, 13 *L. J., Q. B.* 805; *Shrewsbury* v. *Blount*, 2 *M. & G.* 475).

But an untrue statement, made with reckless ignorance of its truth or otherwise, is presumed by law to have been made with knowledge of its untruth (*Evans* v. *Edmonds*, 22 *L. J., C. P.* 211).

Fraudulent Character must be in Writing. Sub-rule (2) *No action lies against a person, for making a false representation of the conduct, credit, ability, or dealings of another, with intent to procure credit, money or goods for such person, unless such false representation is in writing, signed by the defendant* (9 *Geo.* 4, *c.* 14, *s.* 6).

Fraudulent Concealment. Rule 7.—Concealment of a latent defect will support an action for deceit; but not concealment of a patent defect.

(1) Thus: "If I sell a horse that has lost an eye,

no action lies against me for so doing; but if I sell him with a false and counterfeit eye, there an action lieth" (*Southerne* v. *Howe*, 2 Roll. 5).

(2) So where a bailor conceals the dangerous nature of the contents of certain packages, and by reason thereof the bailee suffers damage, the bailor is liable (*Hutchinson* v. *Guion*, 28 *L. J., C. P.* 65).

(3) And even where articles are sold with the saving clause "with all faults," such a clause does not include latent defects (*Pickering* v. *Dowson*, 4 *Taunt.* 784).

Negligence. It is a public duty incumbent upon every one, to exercise due care in his daily life; and any damage resulting from his negligence, is a tort.

RULE 8.—Negligence whereby actual damage is caused, is actionable, unless the negligence of the plaintiff himself contributed to his loss.

The same principle held in the civil law, "Imperitia quoque culpæ enumeratur; veluti si medicus ideo servum tuum occiderit, quod eum male secuerit aut perperam ei medicamentum dederit." (Inst. lib. iv., iii. 7.) And so contributory negligence was held an excuse in case of injury occurring to another. Indeed, the civilians carried the principle much further than we do.

(1) This rule is well illustrated by two cases, in each of which the damnum was the same. In *Fordham* v. *L. B. & S. C. R. Co.* (*L. R.*, 4 *C. P.* 619) the facts were these. The guard of one of the defendants' trains, forcibly closed the door of one of the carriages without giving any warning, whereby the hand of the plaintiff, who was entering the carriage, was crushed. It was held, that the jury were justified in finding that the guard was guilty of negligence, and that there was no contributory negligence on the part of the plaintiff.

(2) Where however the plaintiff on entering a railway carriage, left his hand on the edge of the door half a minute after so entering, and the guard gave due warning before shutting the door, it was held that the act was attributable to the plaintiff's contributory negligence, in leaving his hand carelessly upon a door, which he must have known would be immediately shut (*Richardson* v. *Metropolitan R. Co.*, *L. R.*, 3 *C. P.* 326).

(3) And so in cases of collision, the question is, whether the disaster was occasioned wholly by the negligence or improper conduct of the defendant, or whether the plaintiff himself so far contributed to the disaster, by his own negligence, or want of common and ordinary care, that but for his default in this respect, the disaster would not have happened; in the former case he recovers, in the latter not (*Tuff* v. *Warman*, 27 *L. J.*, *C. P.* 322).

When Contributory Negligence no Excuse.

Sub-rule.—*If the defendant might by the use of*

ordinary care, have avoided the consequences of the plaintiff's mere negligence, the plaintiff is to recover.

Therefore where the plaintiff left his ass with its legs tied in a public road, and the defendant drove over it, and killed it, he was held to be liable; for he was bound to drive carefully, and circumspectly, and had he done so, he might readily have avoided driving over the ass (*Davies* v. *Mann*, 10 *M. & W.* 549).

The civil law was not so strict in this respect, holding that a warning was a sufficient discharge of duty.

Speaking of a person cutting off the branch of a tree near a public road, and through whose default, a slave passing beneath is crushed by the fall of the branch, Justinian says, "Si proclamavit, nec ille curavit cavere, extra culpam esse putator." (Inst. lib. iv., iii. 5.)

Exception.—The rule that contributory negligence prohibits the plaintiff from obtaining compensation, does not apply where the plaintiff is incapable of exercising ordinary care and caution (*Lynch* v. *Nurdin*, 1 *Q. B.* 29). Thus where the defendant's servant left a cart and horse unattended in the street, and the plaintiff, a child under seven years of age, climbed up the wheel, and other children caused the horse to go on, whereby the child's leg was broken, it was held that the jury were justified in finding a verdict for the child (*Lygo* v. *Newbold*, 9 *Ex.* 302).

It seems, however, that where a child is under the

charge of a third person, and through the contributory negligence of such third person the child is injured, it cannot recover; as where a child in its grandmother's charge, is taken by the latter across a railway, and there, owing partly to the railway company's negligence, but partly to that of the grandmother, the child is injured, it cannot recover (*Waite* v. *N. E. R. Co.*, 28 *L. J., Q. B., Ex. Ch.* 258).

What is Negligence. Rule 9.—The negligence in respect of the duty which is actionable, is the omission to do something which a reasonable man would do, or the doing something which a reasonable man would not do; and if such conduct cause damage to another, it is actionable (*Blythe* v. *Birm. Water W. Co.*, 25 *L. J., Ex.* 212).

That is to say, a person ought to use ordinary care; but the law does not compel him to take extraordinary precautions.

(1) A water company whose apparatus was constructed with reasonable care, and to withstand ordinary frosts, was held not to be liable for the bursting of the pipes by an extraordinarily severe frost (*Blythe* v. *B. W. W. C., supra.*)

(2) A railway company must keep bridges, over which they invite passengers to cross, in a safe and secure condition; and if through the faulty construction of such a bridge, a person crossing the same is

injured, an action will lie against the company (*Longmore* v. *G. W. R. Co.*, 19 *C. B., N. S.* 183).

Exception.—There is a remarkable exception to the rule, in the case of keeping of animals, or substances, which a person *has brought* on to his land, the escape of which, would be injurious. In such cases, a man brings the substance and keeps it at his peril; and if it escape on to the land of his neighbour, and injure it, or anything on it, he will be liable, in spite of every precaution which he may have taken.

Thus, where one *brings* and stores water in a pool on his land, and the water escapes, and injures the mines of his neighbour, he will be liable without proof of negligence (*Rylands* v. *Fletcher*, *L. R.*, 3 *H. L.* 330). And this principle has been carried so far, that in the case of *Smith* v. *Fletcher* (*L. R.*, 7 *Ex.* 305) it has been held, that where a person so treats his land, as to cause water to accumulate upon it, instead of running off it as it would do if the land were in its natural state; he will be liable to a neighbouring proprietor, whose mines have been flooded through the percolation of the water so accumulated. "It is to be observed," says Bramwell, B. in that case, "that the mischief the defendants have done, is not merely in causing the water to come, but to stay, and stay in a leaking hollow. If it had come, and could have got away as before the hollow existed, there would have been no harm."

Onus of Proof. The onus of proving the negligence, is generally speaking upon the plaintiff; but,

in some cases, the circumstances alone raise a presumption of negligence, and shift the onus of disproving it upon the defendant.

Rule 10.—Where a thing is solely under the management of the defendant or his servants, and the accident is such, as in the ordinary course of events, does not happen to those having the management of such things, and use proper care; it affords *primâ facie* evidence of negligence (*Scott* v. *London Dock Co.*, 34 *L. J.*, *Ex.* 220).

(1) Thus in *Cotton* v. *Wood* (29 *L. J.*, *C. P.* 333) it was held, that the fact alone that the defendant's omnibus ran over the plaintiff whilst crossing the street, raised of itself no presumption of negligence; for it might equally have happened through the negligence of the plaintiff.

(2) But where a barrel of flour fell from the upper window of the defendant's shop, and injured the plaintiff, it was held to be evidence of negligence *per se* (*Byrne* v. *Boadle*, 33 *L. J.*, *Ex.* 13).

(3) And similarly it was held in *Scott* v. *St. Katherine's Dock Co.* (34 *L. J.*, *Ex.* 220); where the plaintiff, walking by the defendant's warehouse, was injured by the fall of six bags of sugar.

(4) And where two trains belonging to the same company come into collision, the circumstance of itself raises a presumption of negligence (*Skinner* v. *London and Brighton Railway Co.*, 5 *Ex.* 787).

And so also it was similarly held in *Carpue* v. *L. & B. R. Co.* (5 *Q. B.* 747), where an accident happened to a train under the exclusive control of the defendants.

Exception.—But where a train going at a moderate speed, leaves the rails, every part of the machinery and carriages and the railway, being well constructed, and the accident might have been occasioned by the malice of a stranger, no such presumption was held to lie (*Bird* v. *G. N. R. Co.*, 28 *L. J., Ex.* 3). And similarly where a horse, ridden at a walking-pace, suddenly becomes restive, and rushing on to the pavement injures a person, it is no evidence of negligence (*Hammack* v. *White*, 31 *L. J., C. P.* 129).

Defendant's Knowledge. Sub-rule.—*It is not necessary to prove, that the defendant knew of the defect in the instrument, or machine, which caused the accident* (*Sharp* v. *Gray*, 9 *Bing.* 459).

Breaches of Statutory Duties. If a statute creates a duty in favour of an individual, or class of individuals, then (unless it also enforces the duty by a penalty *recoverable by the party aggrieved*) any breach of the duty so created, will, if coupled with damage, be equally a tort as if it had arisen out of a breach of duty under the common law.

Rule 11.—When a statute gives a right,

then, although in express terms it has not given a remedy, the remedy which by law is properly applicable to that right follows as an incident.

An illustration of this rule is given by the case of *Couch* v. *Steel* (3 *E.* & *B.* 402), the facts of which were shortly as follows:—By the statute 7 & 8 Vict. c. 112, s. 18, "every ship navigating between the United Kingdom and any place out of the same, shall have, and keep on board, a sufficient supply of medicines, and medicaments suitable to accidents and diseases arising on sea voyages." To enforce performance of this section a penalty is imposed upon those disobeying it.

The plaintiff having suffered damage in consequence of the default of the defendant in not obeying this section, brought an action.

It was held, that the action would lie; because the statute had created a duty, and although it had given a remedy for the public wrong committed by its violation, viz. the penalty, yet it had not given any remedy to a private person suffering special damage; and "the right to maintain an action for special damage resulting from a breach of public duty, is not taken away, by reason of a penalty, recoverable by a common informer, being annexed as a punishment for the non-performance of a public duty, although it is competent for the plaintiff to sue for the penalty if first in the field" (*Beckford* v. *Hood*, 7 *I. R.* 627). In such cases, the penalty is cumulative upon the ordinary remedy by action; the one

being a punishment for the breach of public duty, the other a recompense for a private wrong. (*Ad.* 38.)

Statutory Remedy. Sub-rule.—*But where the statute creating a new duty, or obligation, provides a mode of obtaining compensation for private special damage by means of a penalty recoverable by the party aggrieved, there is no other remedy,—as the remedy is then prescribed by the act* (*per Campbell, C. J., Couch* v. *Steel, sup.; Underhill* v. *Ellicombe, M'Cl. & Y.* 455).

Where no Right created. Rule 12.—Where no *right* is created by a statute for the specific advantage of the plaintiff, and no duty imposed in his favour, but merely an act prohibited under a penalty, an action for damages is not maintainable. (*Ad.* 38.)

Thus where certain regulations were established by statute for the management of the Pilchard fishery, and enforced by the imposition of penalties; it was held, that a fisherman who had lost his proper turn and station, according to the regulations, through the breach of them by another fisherman, could not maintain an action for damages against him, for the loss of a valuable capture of fish, which the latter had taken, through being in such wrong place; as no particular right was created in his favour (*Stevens* v. *Jeacocks,* 11 *Q. B.* 741).

But, on the contrary, where by 4 & 5 Vict. c. 45, s. 17, a penalty is imposed upon unauthorized persons

unlawfully importing books, reprinted abroad, upon which copyright subsists, the remedy by action is not taken away from the authors; for there is a right created in their favour, and, therefore, the penalty is cumulative (*Novello* v. *Sudlow*, 12 *C. B.* 188).

Felonies. Rule 13.—Where an injury amounts to an infringement of the civil rights of an individual, and at the same time to a felonious wrong, the civil remedy by action is suspended until the party inflicting the injury has been prosecuted (Cockburn, C. J., *Wells* v. *Abrahams*, *L. R.*, 7 *Q. B.* 557).

But although this is the rule, it is extremely doubtful how it can be enforced. It is certainly no ground for the judge at the trial to direct a nonsuit (*Wells* v. *Abrahams*, sup.), and it is excessively doubtful whether it could be raised by plea, because "the effect of that would be to allow a party to set up his own criminality. But it may well be, that if an action were brought against a person who was either in the course of being prosecuted for felony, or was liable to be prosecuted for felony, the summary jurisdiction of the court might be invoked, to stay the proceedings which would involve an undue use, probably an abuse, of the process of this court; in which case the court is always willing to interfere to prevent such abuse" (*per Cockburn, C. J., ibid.*)

And in the same case, Blackburn, J., said, "I do not see how a plaintiff can be prevented from trying his action, unless the court, acting under its summary jurisdiction, interfere." . . . "From the time these cases were decided, there is no reported instance of the court having interfered to stop an action until we come to *Gimson* v. *Woodful* (2 C. & P. 41). That case went to this extent, that where a horse had been stolen by A., and B. afterwards had the horse, the owner could not afterwards bring an action to recover it from B., unless he had prosecuted A. But in *White* v. *Spettigue* (13 *M.* & *W.* 603) that was expressly overruled. The last case is *Wellock* v. *Constantine* (32 *L. J., C. P.* 285)." . . . "That case, I think, cannot be treated as an authority" . . . "to say that because it was for the interest of the public, the action should be stayed until the indictment was tried, and for this purpose to nonsuit the plaintiff, or to direct the jury to find a verdict for the defendant upon issues not proved, seems to me to be erroneous."

The principle to be gathered from this case, therefore, would seem to be, that although the rule exists, it is rarely, if ever, enforced; and that the only way of enforcing it, is by the summary jurisdiction of the court, interfering not at the instance of the defendant, but for the purposes of public justice, and to prevent abuse of its process.

CHAPTER II.

Of quasi Torts.

Arising ex Contractu. Although a tort has been defined, as a wrong independent of contract, there is nevertheless a class of wrongs, which lie on the borderland, as it were, between contract and tort, and for which an action ex contractu, or ex delicto, may generally be brought at the pleasure of the party injured.

Rule 14.—Whenever there is a contract, and something to be done in the course of the employment, which is the subject of that contract, if there be a breach of duty in the course of that employment, the plaintiff may recover either in tort, or in contract (*Brown* v. *Boorman*, 11 *Cl. & F.* 44).

(1.) **Negligence of Professional Men.** Thus if an apothecary carelessly or unskilfully administer improper medicines to a patient, whereby such patient is injured, he may sue him either for the breach of his implied contract to use reasonable skill and care, or for tortious negligence, followed by the actual damage (*Searl* v. *Prentice*, 8 *East*, 847).

(2.) **Waste.** So where a person having an estate for life or years, commits waste, it is both a breach of the implied contract to deliver up the premises in as good a condition as when he entered upon them, and also an injury to the reversion, which is a violation of the reversioner's right, and therefore a tort.

Privity necessary. But as a tort founded upon contract can only properly arise out of an infringement of some duty created by the contract it is a well established rule, that—

RULE 15.—Whenever a wrong is founded upon a contract, no one not a privy to the contract, can sue in respect of such wrong (*Tollit* v. *Shenstone*, 5 *M. & W.* 289).

Thus a master cannot sue a railway company for loss of services, caused by his servant being injured by the company's negligence when being carried by them; for the injury in such a case arises out of the contract between the company and the servant, to which the master is no party (*Alton* v. *Mid. Ry. Co.*, 34 *L. J., C. P.* 292).

When Privity unnecessary. Sub-rule. — *But where there is a distinct tort to the plaintiff altogether separate and apart from the breach of contract to a third party, although connected with it, the plaintiff may maintain an action.*

(1) Thus in cases of fraud, (as mentioned in Chapter I.) a man is responsible for the consequences of a breach of warranty made by him to another, upon the faith of which a third person acts, provided that such false representation was made with the direct intent, that it should be acted upon by such third person (*Barry* v. *Crosbey*, 2 *Johns. & H.* 21).

(2) And so where a father bought a gun for the use of himself and his son, and the defendant sold it to him *for that purpose*, fraudulently representing it as sound, and it exploded, and injured the son, it was held that he could maintain an action of tort, although not privy to the warranty (*Langridge* v. *Levy*, 4 *M. & W.* 338).

(3) So if a surgeon treat a child unskilfully, he will be liable to the child, even though the parent contracted with the surgeon (*Pippin* v. *Sheppard*, 11 *Price*, 400).

(4) So "a stage coach proprietor who may have contracted with a master to carry his servant, if he is guilty of neglect, and the servant sustain personal injury, is liable to him; for it is a misfeasance towards him if, after taking him as a passenger, the proprietor drives without due care" (*Longmeid* v. *Holliday*, 6 *Ex.* 767, *per Parke, B.*).

(5) And so where a servant travelling with his master, who took his ticket and paid for it, lost his portmanteau through the railway company's negligence, he was held entitled to sue the company (*Marshall* v. *York, &c. R. Co.*, 21 *L. J., C. P.* 34).

Misfeasance. There is a class of contracts which are particularly nearly allied to torts. Such are, gratuitously undertaken duties. Such duties are not contracts in one sense, namely, that being without consideration the contractor is not liable for their nonfeasance, *i. e.* for omitting to perform them. But on the other hand, if he once commences to perform them, the contract then becomes choate as it were, by virtue of the following rule—

RULE 16.—The confidence induced by undertaking any service for another, is a sufficient legal consideration to create a duty in its performance (*Coggs* v. *Bernard*, 1 *Sm. L. Ca.*).

Thus in the above case, the defendant gratuitously promised the plaintiff to remove several hogsheads of brandy from one cellar to another, and in doing so one of the casks got staved, through his gross negligence. Upon these facts, it was decided that the defendant was liable; for although his contract could not have been enforced against him, yet having once entered upon the performance of it, he thence became liable for all misfeasance.

Bailments. Such is a brief account of the law upon this head.

In some works, injuries to goods whilst in the keeping of carriers and innkeepers are described as

torts; in others as breaches of contract; but however actions in respect of them may be framed, they are in substance ex contractu, being for non-performance of the contract of bailment, and not for a tort independent of contract (*Rosc.* 539; 2 *Bl. Com.* 451; *Legge* v. *Tucker*, 26 *L. J., Ex.* 71). I shall therefore not treat of them in this work.

CHAPTER III.

Of the Liability of Masters for the Torts of their Servants.

General Liability. It is a well known legal maxim, that, *qui facit per alium, facit per se,* whence the following rule is easily deduced—

Rule 17.—A person who puts another in his place, to do a class of acts in his absence, is answerable for the wrong of the person so intrusted, either in the manner of doing such an act, or in doing such an act under circumstances in which it ought not to have been done; provided that what is done, is not done from any caprice of the servant, but in the course of the employment (*Bayley* v. *Manchester, Sheff. & Lincoln. R. Co., L. R.,* 7 *C. P.* 415).

(1) Thus if a servant drive his master's carriage over a bystander; or if a gamekeeper employed to kill game, fire at a hare and kill a bystander; or if a workman employed in building, negligently drop a stone from the scaffold, and so hurt a bystander; the person injured may claim reparation from the master; because the master is bound to guarantee

the public against all damage arising from the wrongful or careless acts of himself, or of his servants when acting within the scope of their employment (*Bartonshill Coal Co.* v. *Reid*, 3 *Macq. H. L. Ca.* 266).

(2) But if A. employ B. to do a lawful act, and he in doing it wilfully commit a public nuisance, A. is not responsible (*Peachy* v. *Rowland*, 22 *L. J., C. P.* 81). And so where the driver of an omnibus wilfully, and without his master's authority, obstructs a rival omnibus, by drawing across the road, the master is not responsible (*General Omnibus Co.* v. *Limpus*, 32 *L. J., Ex.* 34; 1 *H. & C.* 526).

Wilful Act. Sub-rule (1) *A master is responsible for his servant's wilful act if within the scope of his probable authority, and done for the master's benefit.*

(1) In *Bayley* v. *Manchester, Sheff. & Lincoln. R. Co.* (*sup.*), the plaintiff, a passenger on the defendants' line, sustained injuries in consequence of being pulled violently out of a railway carriage by one of the defendants' porters, who acted under the erroneous impression that the plaintiff was in the wrong carriage. The defendants' bye-laws did not expressly authorize the company's servants to remove any person being in a wrong carriage, or travelling therein without having first paid his fare and taken a ticket. They likewise provided that the porters should act under the orders of the station master, and do all in their power to promote the comfort of the passengers and the interests of the company. It was held, that the porter was acting within the course

of his employment as the defendants' servant, and that his act was one for which they were responsible.

(2) So where an omnibus conductor assaulted, and violently ejected an intoxicated passenger, whereby he sustained serious damage, the proprietor was held responsible; because his servant was acting within the probable scope of his employment as conductor (*Seymour* v. *Greenwood*, 6 *H. & N.* 359).

Acts done, extra Employment. Sub-rule (2) *A master is not responsible for the tortious acts of his servant, committed when the servant is not acting in the employment of the master.*

(1) Thus where a master intrusted his servant with his carriage for a given purpose, and the servant drove it for another purpose of his own in a different direction, and in doing so drove over the plaintiff, the master was held irresponsible, on the ground that the servant was not acting within the scope of his employment; for he started upon an entirely new and independent journey, which had nothing to do with his employment; but it would seem that if the servant when going on his master's business, had merely taken a somewhat longer road, such a deviation would not be considered as taking him out of his master's employment (*Storey* v. *Ashton*, *L. R.*, 4 *Q. B.* 476).

(2) And so where a servant wantonly, and not in the execution of his master's orders, struck the plaintiff's horses, and thereby produced an accident, the master was held not to be liable: but where he struck them in the course of his employment, although in-

judiciously, the master *was* held liable (*Croft* v. *Alison*, 4 *B.* & *A.* 590).

Doctrine of Ratification. The preceding remarks have reference only to cases in which the injury has been occasioned either by the negligence of the servant in the course of his employment, or by his wilful act, done under such circumstances, as make it probable that he was authorized to commit it, upon proper occasion, but had used such authority injudiciously or carelessly. But there is a third class which differs from both of these, viz. where a servant commits a tort whilst not acting in pursuance of his master's employment, but which the master subsequently adopts.

Rule 18.—He that receiveth a trespasser, and agreeth to a trespass after it be done, is no trespasser unless the trespass was done for his use, or for his benefit, and then his agreement subsequent amounteth to a commandment (4 *Inst.* 317).

And in *Wilson* v. *Tumman*, 6 *M.* & *Gr.* 242, the court laid it down that "an act done for another, by a person not assuming to act for himself, but for such other person, though without any precedent authority whatever, becomes the act of the principal, if subsequently ratified by him. In that case the

principal is bound by the act, whether it be for his detriment, or his advantage; and whether it be founded on a tort, or a contract, to the same extent, as by the same act done by his previous authority," for *Omnis ratihabitio retrotrahitur et mandato priori æquiparatur.*

Thus in an action against A. and B. for taking the plaintiff's gun, it was proved that A. took the gun, and delivered it to B., who refused to give it up to the plaintiff; it was held that this did not render B. a joint trespasser with A., *unless it was first taken for B.'s use* or benefit (*Wilson* v. *Barker*, 4 *B. & Ad.* 614. See also judgment, Dallas, C. J., *Hull* v. *Pickersgill*, 1 *Br. & B.* 286).

Meaning of "Servant." The term "servant" does not exclusively apply to menials.

RULE 19.—When a man is hired by the master, either personally, or by those who are intrusted by the master with the hiring of servants, to do the business required of him, the master will be responsible for any torts committed by him within the scope of such business (*Laugher* v. *Pointer*, 5 *B. & C.* 547).

This rule applies not only to domestic servants, but to clerks, managers, and in short all whom the master appoints to do any work, even though they

be not in the immediate employ, or under the immediate superintendence of the master. Thus "if a man is owner of a ship, he himself appoints the sailing master, and desires him to appoint and select the crew; the crew thus become appointed by the owner, and are his servants for the management of his ship; and if any damage happen through their default, it is the same as if it happened through the immediate default of the owner himself" (*Laugher* v. *Pointer, sup.*, per Littledale, J.).

Persons employed by Servant. Sub-rule.—*A master is not in general liable for the negligence of persons employed by the servant to do his work, and between whom and the master the relation of master and servant does not exist.*

(1) Thus where a butcher bought a bullock, and hired a licensed drover to drive it to his shop; and the drover instead of so doing, employed a boy for the purpose; it was held that the butcher was not liable for the injurious consequences caused by the boy's negligence, as the relation of master and servant did not exist between them (*Milligan* v. *Wedge*, 12 *A.* & *E.* 737).

(2) And the rule is in general applied in all cases where one employs another to do some business for him, and that other employs some one else to do it for *him*, and this third person commits a tort in the doing of it; for the first employer neither employs him personally, nor pays him for his labour, nor does he authorise the appointment of him by another, and therefore the relation of master and servant does not

exist between them (*Rapson* v. *Cubitt*, 9 *M. & W.* 710). In such a case the intermediate employer or contractor will be liable (*Overton* v. *Freeman*, 11 *C. B.* 867).

(3) So if the owner of a carriage hire horses from a job master, who at the same time provides a driver; the job master is liable for accidents caused by the driver's negligence, for he is his servant, and not that of the owner of the carriage (*Quarman* v. *Burnett*, 6 *M. & W.* 499).

But in all such cases, if the original hirer either assented to, or ordered the commission of the tortious act, he will be liable; for he would then be master for the time being (*M'Laughlin* v. *Pryor*, 4 *M. & Gr.* 48).

Such is a brief outline of the law relating to the responsibility of masters for the torts of their servants; but the learning on the subject is of so technical a character, and the distinctions as to when a servant is, and when not, acting within the scope of his employment, or even whether he be a servant at all, are so very refined, that a legal training is often necessary in order that the difference may be distinguished. I shall therefore content myself with the foregoing general rules, leaving to other works on the law of master and servant, the task of showing at length what constitutes the relation of master and servant, and when an act may be said to be

done in the course of a servant's employment. The following cases on the subject may however be consulted with advantage, as illustrating the law on the subject:—*Whatman* v. *Pearson*, *L. R.*, 3 *C. P.* 422; *M'Manus* v. *Cricket*, 1 *East*, 106; *Gregory* v. *Piper*, 9 *B. & C.* 591; *Mitchell* v. *Crasweller*, 13 *C. B.* 237; 22 *L. J., C. P.* 100; *Francis* v. *Cockerell*, *L. R.*, 5 *Q. B.* 184; *Lyons* v. *Martin*, 8 *A. & E.* 512.

Liability of Master for Injuries caused by Servant to Fellow-servant. Rule 20.—A master is not liable to his servant for damage resulting from negligence of his fellow-servant in the course of their common employment, unless the servant causing the injury was incompetent to discharge his duty, or the servant injured was not at the time acting in his master's employment.

(1) Thus where a workman at the top of a building carelessly let fall a heavy substance upon a fellow workman at the bottom, the master was held not to be responsible, without proof of the incompetency of the workman causing the injury, to discharge the duty in which he had been employed (*Wiggett* v. *Fox*, 25 *L. J., Ex.* 118).

(2) So in *Hall* v. *Johnson* (34 *L. J., Ex.* 222), the plaintiff was a miner in defendants' employ, as

was also an underlooker whose duty was to see that as the mine was excavated, the roof should be propped up. This he neglected to do, whereby a stone fell and injured the plaintiff; but it was held this attached no liability to the defendants, as no proof was given that they did not use due care in selecting the underlooker for his post.

Meaning of common Employment. Sub-rule. —*The words "in their common employment," do not make it necessary that the servant causing, and the servant sustaining the injury, should both be engaged in precisely the same, or even similar acts.*

Thus the driver and guard of a stage coach; the steersman and rowers of a boat; the man who draws the red-hot iron from the forge, and the man who hammers it into shape; the person who lets down into, or draws up from a pit, or the miners working therein, and the miners themselves; all these are fellow labourers within the meaning of the doctrine (*Barton's Hill Coal Co.* v. *Reid*, 4 *Jur., N. S.* 767). The real test seems to be, whether they are engaged in the same pursuit.

Personal Negligence of Master. Rule 21.— A master is bound to take reasonable precautions to insure his servant's safety, and if a master of dangerous works does not employ staunch and appropriate machinery; or if when

a statute enacts that guards shall be used, he permits the machinery to be used without proper guards, he will be responsible (*Weems* v. *Matheison*, 4 *Macq. H. L. Cas.* 215).

(1) Thus where a servant knowing of a defect in machinery which he has to work in his master's employ, complains of it to him, but continues in the use of it in the reasonable expectation of its being repaired, and an accident happens, he may recover against the master in spite of his knowledge of his danger (*Holmes* v. *Worthington*, 2 *F. & F.* 533; *and Clark* v. *Holmes*, 7 *H. & N.* 937). But where the servant materially contributes by his own negligence to the accident, it is otherwise (*Senior* v. *Ward*, 28 *L. J., Q. B.* 139).

(2) So if the master take part in the servant's employment, and by his negligence the servant is injured, he will be liable; for the principle that the master of fellow-servants is not responsible for injuries caused by one to the other, does not apply in such a case (*Ashwix* v. *Stanwix*, 30 *L. J., Q. B.* 183).

(3) So where a master ordered a servant to take a bag of corn up a ladder, which the master knew, and the servant did not know, to be unsafe, and the ladder broke, and the servant was injured, the master was held liable (*Williams* v. *Clough*, 3 *H. & N.* 258; 27 *L. J., Ex.* 325; *Britton* v. *G. W. Cotton Co.*, 41 *L. J., Ex.* 99).

Servant's Knowledge of Danger. Sub-rule. *If the servant knows of the dangerous character of an*

instrument about which he is employed, equally as well as his master; and there is no personal negligence on the part of the master, he will not be responsible (*Dynen* v. *Leach*, 26 *L. J., Ex.* 221; *Griffiths* v. *Gidlow*, 27 *L. J., Ex.* 404).

Volunteers. Rule 22.—If a stranger invited by a servant to assist him in his work, is while giving such assistance, injured by the negligence of another servant of the same master, no action will lie against the master *Potter* v. *Faulkner*, 1 *B. & S.* 800; 31 *L. J., Q. B.* 30).

The reason of this rule is obvious, for the volunteer, by aiding the servant, is simply of his own accord placing himself in the position of a servant, and that without the consent or request of the master. The latter cannot therefore be fairly called upon, to recompense him for the result of his officiousness.

CHAPTER IV.

Of the Limitation of Actions ex Delicto.

Reasons for Limitation. I have so far treated of the wrongs independent, or quasi independent of contract, of which the law takes cognizance; and I have shown how the law gives a remedy, whenever it holds any act to be wrongful; in accordance with the maxim "ubi jus ibi remedium est."

But although there is always a remedy, yet for the sake of the peace of the kingdom, a man is not allowed to enforce his remedy at his own leisure, and after a long interval, in the course of which evidence may have been entirely swept away, which if produced might prove the defendant's innocence.

For this and other reasons, various statutes have been from time to time passed, which confine the right of action within certain periods after its commencement; periods, which as they differ in different actions, will be more particularly mentioned in the course of the second part of this work. At this stage, I propose to examine only such rules as apply to the limitation of all actions of tort.

Commencement of Period. RULE 23.—When a statute limits the period within which an action is to be brought for an act done or omitted, if the cause of action is a single act, or one which amounts to a trespass, the action must be brought within the prescribed period after the actual doing of the thing complained of. But if the cause of action is not the doing of the thing, but the resulting of damage only, the period of limitation is to be computed from the time when the party sustained the injury (*Backhouse* v. *Bonomi*, 9 *H. L. C.* 503).

The meaning of this rule is, that where the tort consists in the infringement of a right, then as that constitutes per se a tort, so the period of limitation commences to run immediately from the date of the infringement. But on the other hand, where the tort consists in the violation of a duty coupled with actual resulting damage, then as the breach of duty is not of itself a tort, so the period of limitation does not commence to run until it becomes a tort by reason of the actual damage resulting from it.

(1) Thus where A. owned houses built upon land contiguous to land of B., C. and D.; and E. being the owner of the mines under the land of all these persons, so worked the mines, that the lands of B. sank, and after more than six years' interval (the period of limitation in actions on the case), their sinking caused an injury to A.'s houses: Held, that A.'s

right of action was not barred, as the tort to him was the damage caused by the working of the mines, and not the working itself (*Backhouse* v. *Bonomi, supra*).

(2) In an action for wrongful conversion of goods, (which is an injury to a right) the facts were as follows:—A.'s furniture was seized under an execution by the sheriff, and eventually it was bought by A.'s friends, and left in his possession. A. enjoyed the use of it for more than six years and died. Upon A.'s death it was claimed by these friends, and adversely by the widow, on the ground that the Statute of Limitations barred them from claiming it after they had allowed A. to keep it for six years: it was, however, held that the statute did not begin to run until the friends had claimed the furniture, for the tort was the wrongful conversion of the goods, which had only taken place when the widow refused to give them up (*Edwardes* v. *Clay*, 28 *Beav.* 145).

Disability. Rule 24.—Contra non valentem agere nulla currit præscriptio.

(*Where a person is under disability, the statute does not run.*)

Thus where persons who would otherwise have the right to sue, are under certain disabilities, (as, for instance, coverture (in case of a woman), idiocy, or insanity,) the period of limitation does not com-

mence to run until such disabilities have ceased (see 21 Jac. 1, c. 16, s. 7; 3 & 4 Will. 4, c. 27, s. 16).

Exception.—No actions of ejectment shall be brought, and no distress or entry be made to recover land, or rent, but within forty years next after the right of action shall have accrued, notwithstanding that the person entitled to sue may be under some disability (3 & 4 Will. 4, c. 27, s. 17).

Disability subsequent to commencement of Period no Bar. Sub-rule.—*Whenever the statute has once begun to run it continues to do so* (*Rhodes* v. *Smethurst*, 4 *M. & W.* 42; *Lafond* v. *Ruddock*, 13 *C. B.* 819).

Therefore where the plaintiff is under no disability at the time the right of action accrued to him, but subsequently becomes under disability, and continues so until the expiration of the period of limitation, his right of action is barred; for the statute having once begun to run continues to do so.

Continuing Torts. Rule 25.—Where the tort is continuing, the right of action is also continuing (*Whitehouse* v. *Fellowes*, 30 *L. J.*, *C. P.* 305).

Thus where an action is brought against a person for false imprisonment, every continuance of the

imprisonment *de die in diem* is a new imprisonment, and therefore the period of limitation commences to run from the last and not the first day of the imprisonment (*Hardy* v. *Ryle*, 9 *B.* & *C.* 608).

CHAPTER V.

Of the Measure of Damages in Actions of Tort.

Two Classes of Torts. In order to give an intelligible account of the rules relating to damages in actions ex delicto, it is I think expedient to divide such actions into two classes, namely, (1) of torts in which the damage is either bodily or mental suffering, and (2) of torts in which the damage consists of some loss of, or injury to, property.

Section 1.

Of Injuries to the Person or Reputation.

Rule 26.—The damages must be excessive and outrageous to warrant a new trial (*Huckle* v. *Money*, 2 *Wils.* 205).

(1) **False Imprisonment.** Thus where some working-men were unlawfully imprisoned for six hours only, being in the meantime well fed and cared for, yet the jury awarded 300*l.* to each of them; and the court refused to set the verdict aside, as it seemed to them probable that the jury considered the importance of the right of personal liberty, rather than the position of the plaintiffs.

(2) **Seduction.** And so in actions for seduction, "although in point of form the action only purports to give a recompense for loss of service, we cannot shut our eyes to the fact, that it is an action brought by a parent for an injury to his child, and the jury may take into their consideration all that she can feel from the nature of the loss. They may look upon her as a parent losing the comfort as well as the service of her daughter, in whose virtue she can feel no consolation; and as the parent of other children whose morals may be corrupted by her example" (Per Ld. Eldon, *Bedford* v. *M'Kowl*, 3 *Esp.* 120).

(3) **Assault.** So in actions for assault and battery, the court will seldom interfere; and the jury may take the circumstances into consideration, and aggravate or mitigate the damages accordingly.

Thus, to beat a man publicly is a greater insult and injury than to do so in private, and is accordingly ground for aggravation of damages (*Tullidge* v. *Wade*, 8 *Wils.* 18).

(4) **Defamation.** So for defamation, the damages are almost wholly in the discretion of the jury (*Kelly* v. *Sherlock*, *L. R.*, 1 *Q. B.* 686), and the court will seldom interfere with their verdict.

Exceptions.—(1) If it appear that the jury assessed the damages under a mistake, or ill-feeling, or if they give the plaintiff more than he is entitled to according to his own showing, the court will interfere (*Hambleton* v. *Vere*, 2 *Wms. Saund.* 170; *Britton* v. *S. W. R. Co.*, 27 *L. J., Ex.* 355).

(2) And if the jury give their verdict generally on the whole declaration, and one count should be bad, the verdict will be set aside (*Leach* v. *Thomas*, 2 *M.* & *W.* 427).

Aggravation and Mitigation. Rule 27.—The jury may look into all the circumstances, and at the conduct of both parties, and see where the blame is, and what ought to be the compensation according to the way the parties have conducted themselves (*Davis* v. *N. W. R. Co.*, 7 *W. R.* 105).

(1) **Seduction under Guise of Courtship.** In seduction, if the plaintiff have committed the offence under the guise of honourable courtship, that is ground for aggravating the damages; not, however, on account of the breach of contract, for that is a separate offence, and against a different person. "The jury did right in a case where it was proved that the seducer had made his advances under the guise of matrimony, in giving liberal damages; and if the party seduced brings an action for breach of promise of marriage, so much the better. If much greater damages had been given, we should not have been dissatisfied therewith, the plaintiff having received this insult in his own house, where he had civilly treated the defendant, and permitted him to pay his addresses to his daughter" (Wilmot, C. J., *in Tullidge* v. *Wade*, 3 *Wils.* 18).

(2) On the other hand, the previous loose or immoral character of the party seduced, is ground for mitigation. The using of immodest language for instance, or submitting herself to the defendant under circumstances of extreme indelicacy (Ad. 909).

(3) **Plea of Truth in Defamation.** In actions for defamation, a plea of truth is matter of aggravation unless proved, and may be taken into consideration by the jury in estimating the damages (*Warwick* v. *Foulkes*, 12 *M. & W.* 508).

(4) **Plaintiff's Bad Character in Defamation.** On the other hand, evidence of the plaintiff's general bad character has been allowed in mitigation of damages, probably as tending to show that he had little or no reputation to lose (*Jones* v. *Stevens*, 11 *Pr.* 265).

I need hardly, however, point out, that if such evidence be discredited, it will recoil upon the defendant, and act as matter of aggravation instead of mitigation.

(5) **Imprisonment on False Charge of Felony.** In false imprisonment and assault, if the imprisonment has been upon a false charge of felony, where no felony has been committed, or no reasonable ground for suspecting the plaintiff, this will be matter of aggravation (Ad. 585).

(6) **Battery in Consequence of Insult.** But if an assault and battery have taken place in consequence of insulting language on the part of the

plaintiff, this will be ground for mitigating the damages (*Thomas* v. *Powell*, 7 *C. & P.* 807).

Consequential Damages. Rule 28.—Where any special damages have naturally, and in sequence, resulted from the tort, they may be recovered.

The difficulty in cases under this rule, is to determine what damages are the *natural* result, and what are too remote.

(1) **Loss of Business.** If, through the wilful or negligent conduct of another, one should receive corporal injury, whereby he is partially or totally prevented from attending to his business, the pecuniary loss suffered in consequence may be recovered. The most usual instances of this are to be found in actions against railway companies.

(2) **Medical Expenses.** So the medical expenses incurred may be recovered if they form a legal debt owing from the plaintiff to the physician, but not otherwise (*Dixon* v. *Bell*, 1 *Stark.* 289; and see *Spark* v. *Heslop*, 28 *L. J., Q. B.* 197).

(3) **Lord Campbell's Act.** The damages awarded under Lord Campbell's Act to the relatives of persons killed through the default of the defendant should be calculated in reference to a reasonable expectation of pecuniary benefit, as of right or other-

wise, from the continuance of the life of the deceased (*Franklin* v. *S. E. R. Co.*, 3 *H. & N.* 211).

The jury cannot, in such cases, take into consideration the grief, mourning and funeral expenses to which the survivors were put. And this seems reasonable, for in the ordinary course of nature the deceased would have died sooner or later, and the grief, mourning and funeral expenses would have had to be borne then, if not at the time they were borne (*Blake* v. *Mid. R. Co.*, 21 *L. J., Q. B.* 233; *Dalton* v. *S. E. R. Co.*, 27 *L. J., C. P.* 227).

(4) **Injury to Trade.** So in estimating the damages in an action for libelling a tradesman, the jury should take into consideration the prospective injury which will probably happen to his trade in consequence of the defamation (*Gregory* v. *Williams*, 1 *C. & K.* 568).

(5) **Having been obliged to pay Damages to a Third Party.** A good illustration of the rule is also afforded by two cases which relate to injury to property rather than to person or reputation. The first of these is where a landlord, upon his tenant giving notice to quit, entered into a contract with a new tenant. Upon the expiration of the notice, the first tenant refused to quit, and the new tenant not being able to enter, in consequence brought an action against the landlord for breach of contract: it was held, that the landlord might recover in an action against the tenant the costs and damages to which he had been put in the action against him;

for they were the natural and ordinary result of the defendant's wrong (*Bramley* v. *Chesterton*, 2 *C. B., N. S.* 605; and see *Tindal* v. *Bell*, 11 *M. & W.* 228).

(6) **Through Breach of Warranty.** The second instance is somewhat similar. If the purchaser of goods with a warranty, resells them with a warranty, and being sued by his vendee, gives notice to his vendor, who does not tell him to let judgment go by default, and in consequence the plaintiff defends the action, but unsuccessfully; he may recover the damages and costs of his defence from the defendant (*Randall* v. *Raper*, 27 *L. J., Q. B.* 266; *Lewis* v. *Peake*, 7 *Taunt.* 152).

Certain Prospective Damages recoverable. Sub-rule.—*The jury should take into their consideration, in assessing the damages, the probable future injury that will result to the plaintiff from the act of the defendant; for the damages when given, are taken to include all the hurtful consequences arising out of the wrongful act, unknown, as well as known* (*Ad.* 586—991).

Best, C. J. (in *Richardson* v. *Mellish*, 2 *Bing.* 240) says, "When the cause of action is complete, when the whole thing has but one neck, and that neck has been cut off by one act of the defendant, it would be mischievous to say—it would be increasing litigation to say—'you shall not have all you are entitled to in your first action, but you shall be driven to a second, third, or fourth for the recovery of your damages.'" A corollary to this sub-rule is, that several actions cannot be brought in

respect of the same injury. Therefore where a bodily injury at first appeared slight, and small damages were awarded; but subsequently it became a very serious injury, it was held that another action would not lie, for the action having been once brought, all damages arising out of the wrong, were satisfied by the award in the action (*Fetter* v. *Beale*, 1 *Ld. Raym.* 339—692).

Continuing Torts. *Exception.*—But if the tort be a continuing tort, the principle does not apply; for here a fresh cause of action arises *de die in diem*. Thus in a continuing trespass, or nuisance, if the defendant does not cease to commit the trespass, or nuisance, after the first action, he may be sued until he does.

Section 2.

Damages for Injuries to Property.

Compensatory in Character. It is extremely difficult to lay down any rules with regard even to this branch of the subject, where it might be considered that some principles of estimation would apply, for the jury are allowed a much greater latitude than in questions of contract. However it may be laid down as generally true that—

Rule 29.—The damages in respect of injuries to property, are to be estimated upon the basis of being compensatory, for the deterioration in value caused by the wrongful act of the defendant, and for all natural and ne-

cessary expenses incurred by reason of such act.

(1) **Injury to Horse.** Thus in the case of injury to a horse through the defendant's negligence; it has been held, that the measure of damages is the keep of the horse at the farrier's, the amount of the farrier's bill, and the difference between the prior, and subsequent value of the horse (*Jones* v. *Boyce*, 1 *Stark.* 493; *and see Wilson* v. *Newport Dock Co.*, *L. R.*, 1 *Ex.* 187).

(2) **Conversion.** So in the conversion of chattels, the full value of the chattel, at the date of the conversion, is, in the absence of special damage, the true measure ; and if the owner has been deprived of the use of the chattel, and has been obliged to hire another in its place, the expense to which he has been put is recoverable (Ad. 403).

(3) **Trespass.** Where the defendant was in charge of the plaintiff's house, and having one day lost the key he effected an entrance through a window by means of a ladder, and showed some strangers through the house, it was held to be a trespass, for he was only authorized to enter in the ordinary way ; and therefore when some short time afterwards the house was entered through the same window by thieves following his example, and many things stolen, it was held to be the consequence of the defendant's wrongful entry, and that he was liable for the loss of the things stolen (*Ancaster* v. *Milling*, 2 *D. & R.* 714).

Aggravation and Mitigation. Rule 30.—Circumstances of aggravation, or mitigation, may be taken into account in estimating the damages (*Ad.* 299).

Gibbs, C. J. says, "Suppose a gentleman has a paved walk before his window, and a man intrudes, and walks up and down before the window, and remains there after he has been told to go away, and looks in while the owner is at dinner; is the trespasser to be permitted to say, 'Here is a halfpenny for you, which is the full extent of all the mischief I have done.' Would that be a compensation?" (in *Merest* v. *Harvey*, 5 *Taunt.* 441).

(1) **Insolence.** Thus in the above case, where a person trespassed upon plaintiff's land, and defied him, and was otherwise very insolent, the jury returned a verdict for 500*l.* damages; and the court refused to interfere.

(2) **Wrongful Seizure.** And so where the defendant wrongfully seizes another's chattels, and exercises dominion over them; substantial damages will be awarded for the invasion of the right of ownership (*Baylis* v. *Fisher*, 7 *Bing.* 153).

(3) **Causing Suspicion of Insolvency.** And where the defendant took the plaintiff's goods under a false claim, whereby certain persons concluded that the plaintiff was insolvent, and that the goods had been seized under an execution, it was held that exemplary damages might be given (*Brewer* v. *Dew*, 11 *M.* & *W.* 629).

(4) **Return of Goods.** But where the defendant has returned the goods in the course of the action, and they have been received unconditionally by the plaintiff, merely nominal damages will be recoverable; unless the goods have been injured, or some special damage has been suffered (*Ad.* 363).

Where Plaintiff is only Bailee. Rule 31.—Where the plaintiff is merely the possessory, but not the real owner, he may, as against a third party, recover the entire value of the property; but as against the real owner, only the value of his limited interest (*Heydon and Smith's case*, 13 *Co.* 68).

And it seems, therefore, that a *jus tertii* is not proveable in reduction of damages, unless indeed the actual possession of the whole of the property was not in the plaintiff; as where the owner of one sixteenth of a ship attempted to get damages for the whole value of it, he was not allowed to do so (*Dockwray* v. *Dickenson*, *Skin.* 640).

Presumption of Damage. Rule 32.—If a person who has wrongfully converted property, refuses to produce it, it shall be presumed as against him to be of the best description (*Armory* v. *Delamirie*, 1 *Sm. L. Ca.*).

(1) Thus in the above case, where a jeweller who had wrongfully converted a jewel, which had been shown to him; and had returned the socket only, refused to produce it, in order that its value might be ascertained; the jury were directed to assess the damages upon the presumption, that the jewel was of the finest water, and of a size to fit the socket; for *Omnia præsumuntur contra spoliatorem.*

(2) So where a diamond necklace was taken away, and part of it traced to the defendant, it was held that the jury might infer that the whole thing had come into his hands (*Mortimer* v. *Craddock*, 12 *L. J., C. P.* 166).

Damages in Actions of Tort founded upon Contract. Rule 33.—The damages in actions of tort founded upon contract, must be estimated in the same way as they are estimated in breach of contract; for a man cannot, by merely changing the form of his action, put himself in a better position (see *Chinery* v. *Viall*, 5 *H. & N.* 295; *Johnson* v. *Stear*, 33 *L. J., C. P.* 130).

Limited to Damages foreseen by both Parties. Therefore since in breaches of contract, the damages are limited to injuries which may reasonably be presumed to have been foreseen by both parties at the time of contracting, a man cannot sue for extra-

ordinary, though consequential damages (*Hadley* v. *Baxendale*, 9 *Ex.* 354).

County Court. Rule 34.—Where the damages claimed do not exceed 50*l.*, they are recoverable in the county court (13 & 14 Vict. c. 61, s. 1).

Exceptions. The following are not triable in the county court, viz., malicious prosecution, defamation, seduction, cases in which the title to corporeal or incorporeal hereditaments, toll, fair, market or franchise is in question (ibid.); and actions of ejectment, only when the value of the land, and the rent payable for it, are under 20*l.* (30 & 31 Vict. c. 142, s. 11).

The substance, and not the form of the action, determines whether or not it comes under the exceptions; and so one cannot by treating a malicious prosecution as negligence take it out of them (*Hunt* v. *N. Staff. R. Co.*, 2 *H. & N.* 451).

The exceptional cases may, however, become triable in the county court, either (1) by consent in writing, signed by the parties or their attornies (19 & 20 Vict. c. 108, s. 23); (2) by a judge's order that the case be there tried, unless the plaintiff gives security for costs up to 150*l.*, or shows that he has a cause of action fit to be tried in a superior court (30 & 31 Vict. c. 142, s. 10); or (3) by both parties waiving the objection by attending and submitting to the determination of the judge of the county court (*Murish* v. *Murray*, 13 M. & W. 56).

PART II.

RULES RELATING TO PARTICULAR TORTS.

CHAPTER I.

Of Defamation.

Oral or written. Defamation may be either oral or written; in the former case it is called slander, in the latter libel. The law makes a great distinction between slander and libel, considering the latter the more heinous, because the more lasting.

Rule 1.—In order to constitute actionable libel or slander, there must co-exist: (1) a false and disparaging statement, writing, or picture; (2) publication of it; (3) malice, express or implied; and (4) if the slander is oral, actual resulting damage; but this last is not necessary in written slander, for that is a damnum per se.

Falsity. The words must be false, for truth is a good plea to an action for defamation (per Blackburn, J., *in Watkin* v. *Hall, L. R.*, 3 *Q. B.* 400). And in this our law agrees with the civil code, that "eum qui nocentium infamat, non est æquum et bonum ob eam rem condemnari; delicta enim nocentium, nota esse oportet et expedit."

Disparagement. The words, writing, or picture, must be disparaging to be actionable.

Sub-rule (1).—*Disparaging words, are such as impute conduct or qualities tending to disparage or degrade the plaintiff* (*Digby* v. *Thompson*, 4 *B.* & *A.* 821); *or to expose him to contempt, ridicule, or public hatred, or to prejudice his private character, or credit* (*Gray* v. *Gray*, 34 *L. J., C. P.* 45); *or to cause him to be feared or avoided* (*Ianson* v. *Stuart*, 1 *T. R.* 748; *Walker* v. *Brogden*, 19 *C. B., N. S.* 165).

Thus describing another as an infernal villain, is a disparaging statement sufficient to maintain an action (*Bell* v. *Stone*, 1 *B.* & *P.* 331); and so is an imputation of insanity (*Morgan* v. *Lingen*, 8 *L. T., N. S.* 800); or insolvency, or impecuniousness (*Met. Saloon Omnibus Co.* v. *Hawkins*, 28 *L. J., Ex.* 201; *Eaton* v. *Johns*, 1 *Dowl., N. S.* 612); or of gross misconduct (*Clement* v. *Chivis*, 9 *B.* & *C.* 176).

So reflections on the professional and commercial conduct of another, are defamatory; as to say of a physician, that he is a quack; and even to advertize pills as prepared by him (contrary to the fact) would probably be a libel (*Clark* v. *Freeman*, 11 *Beav.* 117). So, also, calling a newspaper proprietor "a libellous journalist," is defamatory (*Wakeley* v. *Cooke*, 4 *Ex.* 518).

The imputation must however in such cases be a charge of professional *misconduct*, and not a mere imputation of unworthy habits, or bad taste (*Clay* v. *Roberts*, 9 *Jur., N. S.* 580).

Accusation of Fraud incident to an Illegal Act. Sub-rule (2).—*Although a true accusation of the*

commission by the plaintiff of an illegal act, is not actionable; yet a false accusation of the commission of a fraud, in the commission of, but ultra such illegal act, is actionable.

Thus playing at dice is an illegal act; but nevertheless it is actionable to accuse a person who has actually played at dice, of having cheated, or played fraudulently (*Greville* v. *Chapman*, 5 *Q. B.* 744).

Publication. Both written and verbal slander must have been published, in order to constitute an actionable injury.

Sub-rule (3).—*The mere communication or delivery over of a slander or libel to any person (except its object), with intent to scandalize the party slandered, is deemed a publication* (*see Rex* v. *Burdett*, 4 *B. & Ald.* 126).

Malice. Express or implied malice, is also a necessary ingredient in both written and verbal slander; but it is generally implied.

Sub-rule (4).—*In an action for defamation, the existence of express malice is only a matter for inquiry, when the words complained of, were spoken on a justifiable occasion* (*Hooper* v. *Gruscott*, 2 *Bing. N. C.* 457; *Watkin* v. *Hall*, *supra*; *Speill* v. *Maule*, *L. R.*, 3 *Ex.* 232).

The meaning of this is, that where a statement, writing, or picture, is false and defamatory, and was not published upon such a lawful occasion as to rebut the presumption of malice, the law will conclude it to be malicious (*Baylis* v. *Lawrence*, 11 *A. & E.* 920).

There are however a class of cases in which express malice must be proved; in such instances the communication is said to be privileged. As privileged communications are important, I shall examine them at greater length presently.

Actual Damage. In oral slander (but not in libel), proof of actual and naturally resulting damage is a necessary condition to the plaintiff's success. Thus a false allegation of a woman's unchastity is not per se actionable; but if she loses a marriage in consequence, an action will lie (*Davis* v. *Gardiner*, 4 *Co.*, 16 *l.*, *pl.* 11). But had the slander been written, it would have been actionable per se.

The law, however, makes very subtle distinctions as to what shall, and what shall not, be considered actual damage, and on this subject I must refer you to larger works, merely giving here the more important decisions.

Nature of Actual Damage. The loss of any office or preferment is sufficient damage, but the loss of friends and character is not (*Roberts* v. *Roberts*, 33 *L. J.*, *Q. B.* 249): nor is illness caused by the slander, for it is not its natural result. Nor is the loss of a husband's conjugal attentions by a wife, unless the slander amounts to an allegation of adultery, and the husband have actually left her; and only then, it would seem, on the ground of loss of support (*Lynch* v. *Knight*, 9 *H. of L. Ca.* 577). The *wrongful* dismissal of a servant on account of the slander is no damnum, for the damage is the loss of the advantages

arising from the situation; and the dismissal being wrongful, the servant may enforce those advantages by an action against the master (*Vicars* v. *Wilcocks*, 8 *East*, 3).

Slander of Title. Slandering a man's title also, by falsely impeaching his right to lands or goods, whereby he loses a purchaser, or suffers other actual damage, is actionable; provided such reports are not spread in a bonâ fide assertion of the defendant's own title (*Wren* v. *Weild*, *L. R.*, 4 *Q. B.* 730). There is however this peculiarity about slander of title, viz. that express malice must be proved (*Pater* v. *Baker*, 3 *C. B.* 831; *Brook* v. *Raul*, 4 *Ex.* 521; *Smith* v. *Spooner*, 3 *Taunt.* 246).

Imputation of Crime, Unfitness for Society and Misconduct in Business. There are certain exceptions to the rule that verbal slander must have caused actual damage in order to be actionable. In fact some slanders import such defamation as must be naturally prejudicial, and therefore in such cases the law presumes a damnum.

Exception (1) A false oral imputation made against another, of the commission of an indictable offence, is a sufficient damnum of itself (*Rowcliff* v. *Edmonds*, 7 *M. & W.* 12).

Thus the words "You are a rogue and I will prove you a rogue, for you forged my name," are actionable (*Jones* v. *Herne*, 2 *Wils.* 89). And it is immaterial that the charge was made at a time when it could

not cause any criminal proceedings to be instituted. Thus the words "You are guilty (innuendo of the murder of D.)" are after the verdict of not guilty a sufficient charge of murder to support an action (*Peake* v. *Oldham*, 2 *W. Bl.* 960). But if words charging a crime are accompanied by an express allusion to a transaction which merely amounts to a civil injury, as breach of trust or contract, they are not actionable (per Ellenborough in *Thompson* v. *Barnard*, 1 *Camp.* 48; and *per Kenyon*, *Christie* v. *Cowell*, *Peake*, 4).

The allegation, too, must be a direct charge of crime. Thus saying of another, that he had foresworn himself, is not actionable, without showing that the words had reference to some judicial inquiry (*Holt* v. *Scholefield*, 6 *T. R.* 691).

Lastly, the imputation of crime is actionable or not, according to the sense in which it might be fairly understood by ordinary bystanders (*Hankinson* v. *Bilby*, 16 *M. & W.* 442).

Exception (2) False words tending to cause exclusion from society are actionable per se.

Thus to allege the *present* possession of an infectious disease is actionable, but a charge of past infection is not; for it shows no present unfitness for society (see *Carslake* v. *Mappledrum*, 2 *T. R.* 473; *Bloodworth* v. *Gray*, 7 *M. & G.* 334).

Exception (3) Words imputing to a man misconduct in, or want of some necessary qualification for, his office or trade, are actionable per se; although

the office or trade is not one of which the court can take judicial notice (*Foulger* v. *Newcomb*, *L. R.*, 2 *Ex.* 327).

Thus words imputing drunkenness to a master mariner whilst in command of a ship at sea are actionable per se (*Irwin* v. *Brandwood*, 2 *H. & C.* 960; 33 *L. J.*, *Ex.* 257).

So where a clergyman is beneficed or holds some ecclesiastical office, a charge of incontinence is actionable; but it is not so if he holds no ecclesiastical office (*Gallway* v. *Marshall*, 23 *L. J.*, *Ex.* 78).

So to say of a surgeon "he is a bad character; none of the men here will meet him," is actionable (*Southee* v. *Denning*, 17 *L. J.*, *Ex.* 151; 1 *Ex.* 196).

Or of an attorney that "he deserves to be struck off the roll" (*Phillips* v. *Jansen*, 2 *Esp.* 624). But it is not ground for an action to say "he has defrauded his creditors, and been horsewhipped off the course at Doncaster," because this has no reference to his profession.

Repeating Slander. Rule 2.—Whenever an action will lie for slander, or libel, it is of no consequence that the defendant was not the originator, but merely a repeater, or printer and publisher of it; and if the damage arise simply from the repetition, and the repeater

had no authority from the originator to repeat it, the originator will not be liable (*Parkins* v. *Scott*, 1 *Hurl. & Colt.* 153; *Watkin* v. *Hall*, *L. R.*, 3 *Q. B.* 396; *McPherson* v. *Daniels*, 10 *B. & C.* 273).

(1) Thus where A. slandered B. in C.'s hearing, and C. without authority repeated the slander to D., per quod D. refused to trust B.: it was held, that no action lay against A., the original utterer, as the damage was the result of C.'s unauthorized repetition, and not of the original statement (*Ward* v. *Weeks*, 4 *M. & P.* 808); but had the originator authorized and requested the repetition, he would have been liable (*Kendillon* v. *Maltby*, *Car. & M.* 402).

(2) **Printing Slander.** So the printing and publishing by a third party of oral slander (not per se actionable), renders the person who prints, or writes and publishes the slander, and all aiding or assisting him, liable to an action, although the originator, who merely *spoke* the slander, will not be liable (*McGregor* v. *Thwaites*, 3 *B. & C.* 35).

(3) Upon this principle the publisher, as well as the author of a libel, is liable; and the former cannot exonerate himself by naming the latter, for "of what use is it to send the name of the author with a libel that is to pass into a part of the country where he is entirely unknown? The name of the author of a statement will not inform those who do not know his character whether he is a person entitled to credit

for veracity or not" (*per Best*, J., *Crespigny* v. *Wellesley*, 5 *Bing.* 403).

Newspaper Proprietors. Sub-rule (1).—*In an action for libel against the proprietor or editor of any newspaper or other periodical, the defendant may plead that the libel was inserted without malice and without gross negligence; and that at the earliest subsequent opportunity he inserted in such or some other publication a full apology; or, if such publication was published at intervals exceeding a month, that he offered to publish such apology in any paper the plaintiff might name. And upon filing such plea, the defendant may pay a sum into court by way of amends* (6 & 7 Vict. c. 96, s. 2).

Privileged Communications. Rule 3.—When a communication is fairly made by one person to another in the discharge of some public or private duty, legal, moral, or social, or in the conduct of his own affairs where his interest is concerned, the occasion prevents the inference of malice, and affords a qualified defence, depending upon the absence of actual malice (*Ad. on Torts*, 770; *Wright* v. *Woodgate*, 2 *C. M. & R.* 573; *Somervillee* v. *Hawkins*, 10 *C. B.* 583; *Lawless* v. *Anglo-Egyptian Cotton Co.*, *L. R.*, 4 *Q. B.* 262; *Speill* v.

Maule, *L. R.*, 4 *Ex.* 232; *Dawkins* v. *Lord Paulet*, *L. R.*, 5 *Q. B.* 94).

(1) **Parliamentary Proceedings.** Speeches in Parliament are privileged (*Stockdale* v. *Hansard*, 9 *A. & E.* 1); but reports of such speeches are not, except those printed by order of the House, which are protected by 3 & 4 Vict. c. 9, s. 1.

(2) **Judicial Proceedings.** Statements of a judge acting judicially, whether relevant or not, are absolutely privileged (*Scott* v. *Stansfield*, *L. R.*, 3 *Ex.* 220), but those of counsel only if relevant, and according to instructions. But fair comments on the opponent's case are allowable (*Hodgson* v. *Scarlett*, 1 *B. & Al.* 232). Attorneys acting as advocates have a like privilege (*Mackay* v. *Ford*, 29 *L. J.*, *Ex.* 404). Statements of witnesses can never be the subject of an action. If false, the remedy is by indictment (*Henderson* v. *Broomhead*, 28 *L. J.*, *Ex.* 360). Fair reports of trials are also privileged (*Lewis* v. *Levy*, 27 *L. J.*, *Q. B.* 282); but the report of an application to a justice not sitting judicially, is not privileged. An application to a magistrate for advice, for instance, is not privileged (*Mc Gregor* v. *Thwaites*, 3 *B. & C.* 24).

(3) **Confidential Advice.** Advice given in confidence at the request of another, and for his protection, is privileged; and it seems that the presence of a third party makes no difference (*Taylor* v. *Hawkins*, 16 *Q. B.* 308; *Manby* v. *Witt*, 25

L. J., C. P. 294; 18 *C. B.* 544); but it seems doubtful whether a voluntary statement is equally privileged (see *Coxhead* v. *Richards*, 15 *L. J., C. P.* 278; *and Fryer* v. *Kinnersley*, 33 *L. J., C. P.* 96).

Thus the character of a servant given to a person requesting it, is privileged (*Gardiner* v. *Slade*, 18 *L. J., Q. B.* 313).

The character of a candidate for an office, given to one of his canvassers, was held to be privileged (*Cowles* v. *Potts*, 34 *L. J., Q. B.* 247).

But imputations circulated freely against another in order to injure him in his calling, however bonâ fide made, are not privileged. Thus a clergyman is not privileged in slandering a schoolmaster about to start a school in his parish (*Gilpin* v. *Fowler*, 9 *Ex.* 615).

(4) **Public and Official Communications.** Communications made bonâ fide on subjects in or concerning which the party communicating has an interest or duty to perform, are privileged, if made to a person having a corresponding interest or duty, although containing criminatory matter which would otherwise be actionable; as, for instance, a memorial to a Secretary of State praying for inquiry into the conduct of a magistrate, or an objection to a person about to be sworn as a constable, made to the justices, on the ground that he is a perjurer (*Harrison* v. *Bush*, 25 *L. J., Q. B.* 25; *Kershaw* v. *Bailey*, 17 *L. J., Ex.* 129).

And so too is a complaint made by a person in the proper quarter that another had stolen his goods (*Toogood* v. *Spyring*, 1 *C. M. & R.* 181).

(5) **Criticism.** Lastly. Fair and just criticism of literary publications and works of art is privileged provided the private character of the author or artist is not attacked (*McLeod* v. *Whateley*, 3 *Car. & P.* 311; *Carr* v. *Hood*, 1 *Camp.* 355; *Thompson* v. *Shackell*, *M. & M.* 187).

Tradesmen's advertisements are within the meaning of literary publications (*Paris* v. *Levy*, 30 *L. J.*, *C. P.* 1).

So too fair criticism is allowed upon the public life of public men or men filling public offices; such as the conduct of public worship by a clergyman (*Kelly* v. *Tinling*, *L. R.*, 1 *Q. B.* 699), provided such criticism does not touch upon his private life (*Gathercole* v. *Miall*, 15 *M. & W.* 319).

Limitation. Rule 4.—All actions for oral slander must be commenced within two years next after the cause of action arose and all actions for libel within six years.

Of course this rule is subject to the general ones particularly set out in the first part of this work.

It may be mentioned that where the tort consist of the actual damage caused by an oral slander the period begins to run from the date of the damage, and not that of the slander, in accordance with rule 23, Part 1 (*Saunders* v. *Edwards*, 1 *Sid.* 95).

CHAPTER II.

Of Malicious Prosecution.

Meaning of. An action may be maintained for maliciously instituting criminal proceedings against another, or for maliciously causing him to be adjudicated a bankrupt (*Farley* v. *Danks*, 4 *E. & B.* 499).

Concurrence of Malice and absence of probable Cause. Rule 5.—In order to support an action for malicious prosecution two things must concur, namely, (1) malice, and (2) want of probable cause (*Williams* v. *Taylor*, 2 *B. & Ad.* 845).

Malice. Malice, as I explained in the last chapter, is either express or implied.

Sub-rule (1).—*In an action for malicious prosecution malice is generally implied upon proof of absence of reasonable and probable cause for instituting the criminal proceedings* (*Johnstone* v. *Sutton*, 1 *T. R.* 544).

(1) Thus where the defendant at the time of the prosecution of the plaintiff showed that he had a

consciousness of the innocence of the accused it was held evidence of malice.

(2) So too where one is assaulted justifiably, and he institutes criminal proceedings for the assault; if in the opinion of the jury he commenced such proceedings knowing that he was wrong, and had no just cause of complaint, malice may be presumed (*Hinton* v. *Heather*, 14 *M.* & *W.* 131).

(3) So too, it may be presumed, if it be shown that the defendant *knew* that the plaintiff against whom he had charged a theft, took the goods under an erroneous belief that he had a legal right to do so (*Huntley* v. *Simpson*, 27 *L. J., Ex.* 134).

(4) So where the prosecutor of another says that he is prosecuting him in order to stop his mouth, it is evidence that he knew him to be innocent, and therefore that the prosecution was malicious (*Heslop* v. *Chapman*, per Maule, J., 23 *L. J., Q. B.* 49).

(5) **Counsel's Opinion.** A man cannot shield himself from the results of a malicious prosecution, on the ground that it was instituted under the advice of counsel; for in such a case every one would be liable to be indicted through the malice or ignorance of another, who happened to have the degree of barrister-at-law (*Hewlet* v. *Crutchley*, 5 *Taunt.* 283).

Reasonable Suspicion. But wherever there has been reasonable cause to suspect the plaintiff, no action will lie, even after his acquittal, or after the prosecution has been dropped; unless only dropped at the last moment, when it is evidence of want of

probable cause (*Williams* v. *Taylor* (sup.), per Tindal, C. J., and Gaselee, J.).

Probable Cause never implied. Sub-rule (2). —*From the most express malice, the want of probable cause cannot be implied* (*Johnstone* v. *Sutton*, *sup.*).

Thus in *Taylor* v. *Williams* (sup.), Tindal, C. J. says malice alone is not sufficient, because a person actuated by the plainest malice may nevertheless have a justifiable reason for prosecution.

Subsequent Malice. Sub-rule (3).—*A prosecution, though in the outset unmalicious, may become malicious if the prosecutor, having acquired positive knowledge of the innocence of the accused, proceeds malo animo in the prosecution* (per Cockburn, C. J., *Fitz John* v. *Mac Kinder*, 30 *L. J., C. P.* 264).

And where a person has not instituted but only adopts and continues proceedings the same principle applies (*Weston* v. *Beeman*, 27 *L. J., Ex.* 57).

Thus where, through the defendant's perjury, the judge of a county court, believing the plaintiff to have perjured himself, committed him for trial, and bound over the defendant to prosecute him, which he did, but unsuccessfully; and after the criminal trial the plaintiff brought an action for malicious prosecution; it was held that the action was maintainable, because, although the defendant had not initiated the proceedings, yet there was no reason why he should have followed them up; for he might have discharged his recognizance by appearing and

telling the truth (*Fitz John* v. *Mackinder*, 30 *L. J., C. P.* 264).

Non-liability of Complainant for Acts of Magistrate. Rule 6.—If a person bonâ fide makes a complaint to a magistrate, and the magistrate erroneously treats the matter as a felony, when it is in reality only a civil injury, and issues his warrant for the apprehension of the plaintiff, the defendant who complained to the magistrate is not responsible for the magistrate's error (*Wyatt* v. *White*, 29 *L. J., Ex.* 193).

Specific Charge aliter. But if there be no reasonable and probable cause for suspecting that a felony has been committed, and the defendant makes a specific charge of felony, it is otherwise.

Causing Search Warrant to issue. Thus where one, without reasonable and probable cause, causes a search warrant to issue against the plaintiff, he is liable to an action; but if he merely goes before a magistrate and bonâ fide puts before him reasonable grounds of suspicion, and the magistrate thereupon, in the exercise of his discretion, issues the warrant, no action lies (*Cooper* v. *Booth*, 3 *Esp.* 144).

Setting aside Proceedings. Rule 7.—If a conviction (or adjudication in bankruptcy) of the plaintiff have actually taken place, it must be quashed or set aside before he can maintain an action (*Mellor* v. *Baddeley*, 2 *Cr. & M.* 678; *Whitworth* v. *Hall*, 2 *B. & Ad.* 698).

But the mere setting aside of the proceedings does not per se imply a want of reasonable and probable cause for their initiation.

CHAPTER III.

Of False Imprisonment and Malicious Arrest.

What constitutes Imprisonment. Rule 8.— Where a total restraint for some period, however short, is put upon the liberty of another without sufficient legal authority, an action lies for the infringement of the right (*Bird* v. *Jones*, 7 *Q. B.* 743).

Moral Restraint. Imprisonment does not imply incarceration, but any restraint by force or show of authority; as, for instance, where a bailiff tells a person that he has a writ against him, and thereupon such person peaceably accompanies him, that constitutes an imprisonment (*Grainger* v. *Hill*, 4 *Bing. N. S.* 212).

But some total restraint there *must* be, for a partial restraint of locomotion in a particular direction, as by preventing the plaintiff from exercising his right of way over a bridge, is no imprisonment, for no restraint is thereby put upon his liberty (*Bird* v. *Jones*, *sup.*).

The rules which apply to imprisonments by private persons, and those which apply to imprisonments by

judges and other magistrates, are necessarily different.

It will be therefore more convenient to consider them separately and in order.

Section 1.

Of Imprisonments by Private Persons and Constables.

General Immunity. Rule 9.—No person can in general arrest or imprison another without a legal and legally executed warrant.

Exceptions. (1) *Bail.*—A person who is bail for another may always arrest and render him up in his own discharge (*Lyne, Exp.*, 3 *Stark.* 132).

(2) *Felons.*—A treason or felony having *been actually committed*, a private person may arrest one *reasonably* suspected by him; but the suspicion must not be mere surmise (*Beckwith* v. *Philby*, 6 *B. & C.* 635).

A constable may, however, arrest merely upon reasonable suspicion that a felony has been committed, and that the party arrested was the doer, and even though it should turn out eventually that no felony has been committed he will not be liable (*Marsh* v. *Loader*, 14 *C. B., N. S.* 535; *Griffin* v. *Coleman*, 28 *L. J., Ex.* 134).

The suspicion, however, must be a reasonable one, or the constable will be liable. Thus where one told the defendant, a constable, that a year before he had had his harness stolen, and that he now saw

it on the plaintiff's horse, and thereupon the defendant went up to the plaintiff and asked him where he got his harness from, and the plaintiff making answer that he had bought it from a person unknown to him, the constable took him into custody, although he had known him to be a respectable householder for twenty years. It was held that the constable had no reasonable cause for suspecting the plaintiff, and was consequently liable for the false imprisonment (*Hogg* v. *Ward*, 27 *L. J., Ex.* 443).

(3) *Breakers of Peace.*—A private person may and ought to arrest one committing, or about to commit, a breach of the peace, but not if the affray be over and not likely to recur (*Timothy* v. *Simpson*, 1 *Cr., M. & R.* 757).

But it seems that a constable may arrest even after the affray (so that it be immediately after), in order to take the offender before a magistrate (*R.* v. *Light*, 27 *L. J., M. C.* 1).

(4) *Night Offenders.*—Any person may arrest and take before a justice one *found committing* an indictable offence between 9 p.m. and 6 a.m. (14 & 15 Vict. c. 19, s. 11).

(5) *Malicious Injuries.*—The owner of property, his servant or a constable, may arrest and take before a magistrate any one *found committing* malicious injury to such property (14 & 15 Vict. c. 19, s. 11).

(6) *Offering Goods for Pawn.*—A private person to whom goods are offered for sale or pawn may, if he has reasonable ground for suspecting that an offence against the Larceny Amendment Act (24 & 25 Vict. c. 96) has been committed with respect to

them, arrest the person offering them, and take him and the property before a magistrate.

(7) *Vagrants.*—Any person may arrest and take before a magistrate one found committing an act of vagrancy (5 Geo. 4, c. 83).

N.B. Such acts are soliciting alms by exposure of wounds, indecent exposure, false pretences, fortune-telling, betting, gaming in the public streets, and many other acts, for which I must refer to the 4th section of the Act.

In other cases, to justify an arrest, the warrant, writ or order of some competent court must be obtained, and the person arresting must have it with him at the time, ready to produce if demanded (*Gilliard* v. *Loxton*, 31 *L. J., M. C.* 123).

Under the 4th, 5th and 7th exceptions, it is no excuse to prove commission of the offence immediately before the arrest, for the arrest must be made *in the course of the commission* of the offence. (See *Simmon* v. *Milligan*, 2 *C. B.* 533.)

Particular Exceptions.—In London, the owner of property may arrest any one *found* committing any indictable offence or misdemeanor punishable upon summary conviction.

Most Railway Acts, too, give power to officers of the company to detain unknown offenders against the Act.

Officers in the army may arrest a deserter, and ship masters have special powers of imprisoning crew and passengers.

Special powers too are frequently given to the police of certain towns and cities by their local acts.

Section 2.

Of Imprisonment by Judicial Officers.

Not liable for, if acting within Jurisdiction. Rule 10.—No judicial officer is liable while acting within his jurisdiction or authority to an action for a wrongful imprisonment committed by him erroneously or through a mistaken judgment, unless he acted maliciously (*Doswall* v. *Impey*, 1 *B. & C.* 169; *Kemp* v. *Neville*, 10 *C. B., N. S.* 523).

(1) Thus where a court has jurisdiction of a matter before it, but acts erroneously, the parties suing, the court itself, and the officers executing its orders or warrants, will be protected from any action at the suit of a person arrested. But where it has no jurisdiction all these parties may be liable (*Comyn, Dig. tit. County Court*, 8; *Houlden* v. *Smith*, 14 *Q. B.* 841; *Wingate* v. *Waite*, 6 *M. & W.* 746).

(2) So where a magistrate acts without those circumstances which must concur to give him jurisdiction he will be liable (*Morgan* v. *Hughes*, 2 *T. R.* 225).

Who are Judicial Officers. The term judicial officer includes judges of all courts of record, stewards of courts baron, vice-chancellors of the universities, grand and petty jurymen, magistrates, arbitrators, and all persons to whom power is given to hear, examine and punish.

Jurisdiction. In order to constitute a jurisdiction such officer must have before him some suit or complaint about which he has authority to inquire. Thus an information brought before a magistrate charging an offence within his cognizance gives him jurisdiction (*Cave* v. *Mountain*, 1 *M. & G.* 257).

Prima facie Jurisdiction. Sub-rule.—*A judge of an inferior court having a primâ facie jurisdiction over a matter is not responsible for a false imprisonment committed on the faith of such primâ facie jurisdiction, if by reason of something of which he could have no means of knowledge he really has no jurisdiction* (*Calder* v. *Halkett*, 3 *Moore, P. C. C.* 28).

Thus if through an erroneous statement of facts a person be arrested under process of an inferior court for a cause of action not accruing within its jurisdiction, no action lies against the judge or officer of the court, but against the plaintiff only (*Ollictt* v. *Bessey*, 2 *W. Jones*, 214).

In general, however, where a court has jurisdiction, the person setting it in motion is not liable for a false imprisonment committed under its order unless he set it in motion maliciously; but where it has no jurisdiction the complainant will be liable, even though acting bonâ fide (*West* v. *Smallwood*, 3 *M. & W.* 421).

Contempt of Court. Rule 11.—The superior courts of law and equity have power to punish by commitment for any insult offered to them, and any libel upon them, or any contemptuous or improper conduct committed by any person with respect to them; but inferior courts of record have power only to commit for contempts committed in the court.

(1) Thus any attempt to influence or prejudice the fair trial of a pending suit is a contempt of the superior courts (*Darr* v. *Eley*, *L. R.*, 7 *Eq. Ca.* 49).

(2) It seems that the judge of a county court has power only to commit for contempts committed in the court and whilst it is sitting. (See *R.* v. *Leroy*, *Weekly Notes*, *Feb.* 8, 1873.)

(3) A justice of the peace may commit one who calls him in court a liar (*Rex* v. *Revel*, 1 Str. 421).

Justices. Rule 12.—If a felony or breach of the peace be committed in view of a justice, he may personally arrest the offender or command a bystander to do so, such command being a good warrant. But if he be not present he must issue his written warrant to apprehend the malefactor (2 Hale, Pl. Cr. 86).

Protection of Justices acting without Jurisdiction. Rule 13.—Where a justice acts in a matter without any, or beyond his jurisdiction, a person injured by any conviction or order issued by such justice in such matter cannot maintain an action in respect thereof until such conviction shall have been quashed by the proper tribunal in that behalf, nor for anything done under a warrant followed by a conviction or order, until such conviction be quashed, nor at all for anything done under a warrant for an indictable offence, if a summons had been previously served and not obeyed. (See 11 & 12 Vict. c. 44.)

But if the justice acted maliciously it would be otherwise.

Constables executing the warrants of justices issued without jurisdiction are specially protected by 24 Geo. 2, c. 44, ss. 6, 8, from any action, unless they have refused for six days after written demand to produce the warrant.

It may be also observed that by sect. 9, a month's notice is required to be given before commencing an action against a justice for any act done in the execution of his office; and by 11 & 12 Vict. c. 44, s. 11, if after such notice, and before the commencement of the action, the justice tender a sum of money in amends, then if the jury shall be of opinion that such sum is sufficient they shall give their verdict for

the defendant. A justice acting maliciously is entitled to notice and to tender amends (*Leary* v. *Patrick*, 15 *Q. B.* 272).

Malicious Arrest. This consists in wilfully putting the law in motion to effect the arrest of another without cause. Its occurrence, owing to the practical abolition of imprisonment for debt by the Debtors' Act, 1869, is now infrequent.

RULE 14.—Any person maliciously causing the arrest of another is liable to an action.

By a malicious act is not only meant a wicked and spiteful act, but also a deliberately intentional wrong, although done without any actual spite or ill-feeling.

(1) Therefore, if by a false statement or suppression a man obtains the arrest of another, he is liable to an action.

(2) So a false affidavit whereby a judge's order is obtained for the arrest of an absconding debtor, renders the deponent liable to the person arrested.

Habeas Corpus. Such are the leading principles of law relating to deprivation of liberty; it remains to notice a peculiar and unique remedy which the law affords in addition to that by action. I mean the writ of habeas corpus ad subjiciendum.

This writ may be obtained upon motion to any of the superior courts of law or equity, or to a judge when those courts are not sitting. Probable cause must be shown by the person moving that there is a wrongful detention, and if the court or judge thinks that there is reasonable ground for suspecting illegality the writ is granted.

It is directed to the individual detaining the person in custody, and commands him to produce the body of the prisoner in court on a certain day, and there account for his detention, and to do and submit to whatsoever the court or judge shall order in the matter. If on the day mentioned the detainer can justify the detention, the prisoner is remitted to his custody. If not he is discharged, and may then have his remedy by action.

The writ of habeas corpus existed at common law, but it has been more formally declared and defined by statutes, chief among which are 31 Car. 2, c. 2, and 56 Geo. 3, c. 100.

Limitation. Rule 15.—No action shall be brought for false imprisonment except within four years next after the cause of action arose.

It must be recollected that imprisonment is a continuing tort, and therefore the period runs from the last day of the imprisonment, and not from the first (see rule 25, Part 1).

Exceptions. (1) *Justices.*—An action against a justice of the peace for anything done by him in the execution of his office must be commenced within six calendar months next after the commission of the act complained of (11 & 12 Vict. c. 44, s. 8).

(2) *Constables.*—Various Acts for the appointment and regulation of police limit the period within which actions may be brought against them. The following are the most important: 10 Geo. 4, c. 44, relating to the Metropolitan police, by sect. 41 enacts that all actions for anything done in pursuance of the Act shall be (inter alia) commenced within six calendar months, and that a month's written notice shall be given to them, and the same provision is extended to special constables and county policemen by 1 & 2 Will. 4, c. 41, and 2 & 3 Vict. c. 93, respectively. Borough constables are protected in a similar manner by 5 & 6 Will. 4, c. 76, s. 113; and sect. 76 of the same act enacts that men sworn as such shall not only within the borough but also within the county in which the same is situated, and in any county within seven miles of such borough, have all such powers and privileges, and be liable to all such duties and responsibilities, as any constable at the time of the passing of that act had or thereafter might have within his constablewick.

Constables may also pay money into court. (See 11 & 12 Vict. c. 44, ss. 9, 11.)

All such actions against justices and constables must (by various acts) be laid in the county in which the trespass was committed.

CHAPTER IV.

Of Assault and Battery.

Direct and Indirect bodily Injuries. Torts affecting the body are either the immediate results of force put in motion by the defendant, or the indirect results of wrongful conduct on his part. In this chapter I shall speak of direct bodily injuries or trespasses.

Causing Death. Direct personal injuries causing death are crimes of a most heinous nature. They rather come, therefore, under the ordinances of the criminal than of the civil law. Putting these aside, all other direct bodily injuries may be considered as either assaults, or more or less aggravated forms of battery.

Assault. An assault is an unsuccessful attempt to do harm to the person of another.

Rule 16.—If one make an attempt, and have at the time of making such attempt, a present ability to do harm to the person of another, although he actually do no harm, it is nevertheless an assault.

(1) Such, for instance, is menacing with a stick a person within reach thereof, although no blow be struck (*Read* v. *Coker*, 13 *C. B.* 850).

(2) But a mere threat is no assault, unless there be a present ability to carry it out.

This was illustrated by Pollock, C. B., in *Cobbet* v. *Grey* (4 *Exch.* 744). "If," said that learned judge, "you direct a weapon, or if you raise your "fist within those limits which give you the means of "striking, that may be an assault; but if you simply "say at such a distance as that at which you cannot "commit an assault,* I will commit an assault, I "think that is not an assault."

(3) To constitute an assault there must be an *attempt.* Therefore, if a man says that he would hit another were it not for something which withholds him, that is no assault, as there is no apparent attempt (*Tuberville* v. *Savage*, 1 *Mod.* 3).

(4) For the same reason shaking a stick in sport at another is not actionable (see *Christopherson* v. *Bare*, 11 *Q. B.* 477).

Battery. Rule 17.—The least touching of another's person hostilely or against his will is a battery (*Rawlings* v. *Till*, 3 *M. & W.* 28).

This touching may be occasioned by a missile or any instrument set in motion by the defendant, as by

* Query—battery.

throwing water over another (*Russell* v. *Horne*, 8 *A. & E.* 602), or spitting in his face. In accordance with the rule a battery must be involuntary; therefore a voluntarily suffered beating is not actionable (Patterson, J., in *Christopherson* v. *Bare*, 11 *Q. B.* 477). Merely touching a person in order to engage his attention is, however, no battery (*Coward* v. *Baddeley*, 28 *L. J., Ex.* 261).

Wounding and Maiming. If the violence be so severe as to wound, the damages will be greater than those awarded for a mere battery; so also if the hurt amount to a mayhem (that is, a deprivation of a member serviceable for defence in fight), but otherwise the same rules of law apply to these injuries as to ordinary batteries.

Intention. Rule 18.—An injury may be a trespass although unintentional, unless it were the result of inevitable accident (*Covell* v. *Laming*, 1 *Camp.* 477).

(1) Thus where the defendant unintentionally upset the plaintiff in his carriage, it was held to be a trespass (*Hopper* v. *Reeve*, 7 *Taunt.* 698).

(2) Indeed an act which is of itself lawful may be a trespass if another suffers damage thereby, for every bodily injury is an invasion of a right and is actionable unless caused by unavoidable accident (in which case it may be said to be the act of no one), or by the negligence or malice of a third party.

Thus if a man assault me, and in lifting up my

stick to defend myself I hit another, an action lies against me (per Blackstone, J., in *Scott* v. *Shepherd*, 2 *W. Bla.* 894); and so in *Weaver* v. *Ward*, it was held that no man shall be excused of a trespass, except it may be judged utterly without his fault (*Hob.* 134).

Inevitable Accident. But if the injury arise from inevitable accident, there is no remedy (*Gibbons* v. *Pepper*, 1 *L. Raymond*, 38).

Such being the nature of a battery, let us now consider when it is and when not a tort.

RULE 19.—Every man has an inherent right to immunity from interference with, or violence or injury to, his body at the hands of any other person.

Exceptions. (1) *Self-Defence.*—A battery is justifiable if committed in self-defence. Such a plea is called a plea of son assault demesne. But to support it, the battery justified must have been committed in actual defence, and not afterwards, and in mere retaliation (*Cockroft* v. *Smith*, 11 *Mod.* 43). Neither does every common battery excuse a mayhem. As, if "A. strike B., B. cannot justify drawing his sword, and cutting off A.'s hand," unless there was a dangerous scuffle, and the mayhem was inflicted in self-preservation (*Cooper* v. *Beale*, *L. Raym.* 177).

(2) *Defence of Property.*—A battery committed in defence of real or personal property is justifiable.

Thus if one forcibly enters my house, I may forcibly eject him; but if he enters quietly, I must first request him to leave. If after that he still refuse, I may use sufficient force to remove him, in resisting which he will be guilty of an assault (*Wheelor* v. *Whiting*, 9 *C.* & *P.* 265).

So a riotous customer may be removed from a shop after a request to leave.

(3) *Correction of Pupil.*—A father or master may moderately chastise his son, pupil, or apprentice (*Penn* v. *Ward*, 2 *Cr., M.* & *R.* 338).

Other Exceptions.—An assault may be committed in order to stop a breach of the peace, to arrest a felon, or one, when a felony having actually been committed, is reasonably suspected of it, in arresting a person *found committing* a misdemeanor between the hours of 9 p.m. and 6 a.m., in arresting a malicious trespasser, or vagrant under the Vagrancy Act.

A churchwarden or beadle may eject a disturber of a congregation, and a master of a ship may assault and arrest an unruly passenger. So assaults and batteries, committed under legal process, are justifiable; but a constable ought not *unnecessarily* to handcuff an unconvicted prisoner, and if he do so he will be liable to an action (*Griffin* v. *Coleman*, 28 *L. J., Ex.* 134).*

Limitation. Rule 15 applies to assault and battery.

* The same rule as to notice, tender of amends and limitation applies to batteries committed by constables in the execution of their duty as in false imprisonment.

CHAPTER V.

Of Indirect bodily Injuries.

When actionable. Rule 20.—Any bodily injury (not being the *direct* result of force set in motion by the defendant) caused by any wrongful conduct on the part of the defendant will support an action of trespass on the case.

Thus where a person suffers in health through the bad practices of another, an action lies; as, for instance, when the ill health is caused by the defendant selling to the plaintiff unwholesome food or wine, or by carrying on a noxious trade in his neighbourhood, or by the negligence of his physician or surgeon (Steph. Comm., bk. 5, c. 8).

Nuisances. Next to indirect corporal injuries arising out of the negligence of servants (and of which I have treated in the first Part) those resulting from nuisances are most numerous.

Rule 21.—Any wrongful act or omission of a person in the management of his property,

and any wrongful interference by him with property of the public, whereby bodily harm is occasioned to another, constitutes an actionable nuisance, unless the plaintiff contributed to his own misfortune.

(1) **Excavations.** Thus where a man makes an excavation adjoining a highway, and keeps it unfenced, he will be liable for any injury occasioned to a person falling into it (*Barnes* v. *Ward*, 9 *C. B.* 392; *Bishop* v. *Trustees of Bedford Char.*, 28 *L. J.*, *Q. B.* 215).

(2) And so anything injurious to the health of persons living near, as a foul cesspool, or any noisome or noxious employment, act, or omission, is a nuisance.

(3) **Statutory Nuisances.** Certain acts have been declared nuisances by statute, and private damage caused by them is of course actionable. Thus by 24 & 25 Vict. c. 100, s. 31 (re-enacting 7 & 8 Geo. 4, c. 18), the setting of spring-guns, man-traps, or other engines calculated to kill or do grievous bodily harm to a trespasser is made a misdemeanor, and even a trespasser hurt thereby may recover; for although it would be partly owing to his own misconduct, yet if the defendant might, by acting rightly, have avoided doing the injury, the plaintiff's contributory misconduct is no excuse. In fact, the principle is the same as that expressed in the sub-rule to rule 8 (ante, page 15). But this act does not apply to the setting

of traps or guns in the night in dwelling-houses for the protection thereof.

(4) So by the General Highway Act, 5 & 6 Will. 4, c. 50, s. 70, it is made illegal for any person to sink any pit, or erect any steam or other like engine, gin, or machinery attached thereto, within twenty-five yards from any part of a carriage or cart way, unless concealed within some building or behind some fence, so as to guard against danger to passengers, horses, or cattle. It also prohibits the erection of windmills within fifty yards, and fires for the burning ironstone, limestone, or making bricks or coke, within fifteen yards of a carriage or cart way.

Sect. 72 prohibits the letting off of fireworks or firearms within fifty feet of the centre of the way, as also laying of things upon it or obstructing it in any way.

This Act creating these or some of these duties, any corporal injury caused to an individual by their non-observance is actionable, even though the person injured were trespassing at the time (within twenty-five yards of the way). But if the act has been complied with, any injury caused by any of the things therein mentioned would be no ground of action, there being no injuria or wrongful act.

(5) Thus where the defendants were owners of waste land bounded by two highways and worked a quarry outside the prohibited distance in such land, and the plaintiff walking over the waste fell into the quarry and broke his leg, it was held that no action lay, the plaintiff being a mere trespasser (*Hounsell* v. *Smith*, 29 *L. J., C. P.* 203; *and see Binks* v.

S. Y. & R. D. R. Co., 32 *L. J., Q. B.* 26; *Hardcastle* v. *S. W. & Y. D. R. Co.*, 23 *L. J., Ex.* 139).

And so by the civil law a trespasser could not recover for injuries suffered whilst trespassing, through the dangerous business of the landowner, for "extra culpam esse intelligitur si seorsum a via forte vel in medio fundo cædebat, quia in loco nulli extraneo jus fuerat versandi." (Inst., lib. iv., iii. 5.)

(6) **Ruinous Premises.** Leaving premises adjoining a highway, or the land of another, in a ruinous condition is a public nuisance entitling a person injured thereby to damages (*Todd* v. *Flight*, *L. J., C. P.* 21).

Owner and Occupier. But here a question arises as to the respective liabilities of the landlord and the tenant.

Rule 22.—As between landlord and tenant there is no implied obligation to keep a house in repair, but with respect to other people the tenant is always responsible, and the landlord is also liable if when he let or relet the premises they were in a ruinous state or became so in the middle of the tenancy, he having expressly contracted to keep them in repair (*Robins* v. *Jones*, 15 *C. B., N. S.* 221; *Rich* v. *Basterfield*, 16 *L. J., C. P.* 273).

(1) Thus if in consequence of the ruinous state of a house the chimney fall and injure the tenant's family, yet he has no remedy, unless the landlord had contracted to keep the house in repair, or unless there was fraud on his part in concealing the defect from the tenant (*Gott* v. *Gandy*, 23 *L. J., Q. B.* 1; *Keats* v. *Cadogan*, 20 *L. J., C. P.* 76).

(2) But had a stranger been injured by the accident both landlord and tenant would have been liable (*Todd* v. *Flight*, 30 *L. J., C. P.* 21).

Rule 23.—Where a landowner creates a nuisance, or buys land with a subsisting nuisance upon it, he is liable for the results of the nuisance, even though he grant the land absolutely to another. For a wrongdoer who conveys his wrongs to another, whereby he puts it out of his power to redress it, ought to answer for it (*Roswell* v. *Prior*, 12 *Mood.* 639).

This rule is founded on the general principle, that a man shall be responsible for the probable consequences of his acts. "It is a fundamental principle of law and reason, that he that does the first wrong shall answer for all consequential damages; and the original erection does influence the continuance, and it remains a continuance from the very erection, and by the erection till it be abated" (*Ibid.*).

Nuisances on Private Ways. Rule 24.—When a person expressly or impliedly permits others to come on to private ways on his land he is liable for any injury caused to them by a nuisance thereon or near to the same, but not if they stray from such paths and trespass on the adjoining ground.

(1) Thus a person permitting the use of a pathway to his house holds out an invitation to all having any reasonable ground for coming to the house to use his footpath, and he is responsible for neglecting to fence dangerous places; and so also a shopkeeper, who leaves a trap-door open without any protection, is liable to a person lawfully coming there who suffers injury by falling through such trap-door (Tindal, C. J., *Lancaster Canal Co.* v. *Parnaby*, 11 *A. & E.* 243; *Barnes* v. *Ward*, 9 *C. B.* 420; 19 *L. J., C. P.* 200; and see *Blyth* v. *Topham*, 1 *Roll. Ab.* 88).

But where a person, straying from the ordinary approaches to a house, trespasses where there is no path and falls into an unguarded pit, he has no remedy for any injury suffered thereby, as the hurt is in such case caused by his own carelessness and misconduct, and accordingly the doctrine of contributory negligence applies (Wilde, B., *Bolch* v. *Smith*, 31 *L. J., Ex.* 203).

(2) **Ruinous Railway Works.** Railway companies are responsible for the state of their works, and therefore are liable to any person injured by the

faulty construction or negligent keeping up of their bridges, embankments, &c. (*Chester* v. *Holyhead R. Co.*, 2 *Ex.* 251). But if the ruinous state has been caused by a *vis major* or act of God, (as where the railway gave way through an extraordinary flood,) the company are not liable provided their line was constructed so firmly as to be capable of resisting the foreseen though more than ordinary attacks of the weather (*Withers* v. *North Kent R. Co.*, 27 *L. J., Ex.* 417; *G. W. R. Co. of Canada* v. *Fawcett*, 1 *Moore, P. C. C., N. S.* 120).

(3) **Canals.** So too canal companies are bound to take reasonable care to make their canal as safe as possible to those using it (*Lanc. Can. Co.* v. *Parnaby*, 11 *A. & E.* 243).

Injuries to Servants. A man's liability to his servants for injuries sustained by them through his negligence or nuisance has been already noticed in the second chapter.

Injuries to Guests. Rule 25.—Mere guests, licensees and volunteers are considered as temporary members of the host's family, and can therefore only recover for injuries caused to them by hidden dangers which they did not know of, but which the host knew or ought to have known of. But visitors on business

which concerns the occupier of premises may maintain an action for any injury caused by the unsafe state of the premises.

(1) Thus in *Southcote* v. *Stanley* (1 *H.* & *N.* 247), the plaintiff was a guest of the defendant's, and when leaving the house a loose pane of glass fell from the door as he was pushing it open and cut him. It was held, that the plaintiff being a guest was for the time being one of the family and could not recover for an accident, the liability to suffer which he shared in common with the rest of the family.

(2) **Persons coming on Business.** But where on the contrary a workman came *on business* to the defendant's manufactory and there fell down an unguarded shaft, the defendant was held to be liable; although it would have been otherwise had the plaintiff been one of his own servants, for it was not a hidden danger (*Indermaur* v. *Dames*, *L. R.*, 1 *C. P.* 274; 2 *ib.* 311).

(3) **Negligence on Railway Stations.** So in the case of railway companies, the company must take great care to ensure the safety of persons coming to their station, and if through want of light or proper directions any such person is injured he may maintain an action against the company. Thus where the plaintiff, having a return ticket, arrived at the wrong side of the station, and there being no proper crossing and no directions

crossed the line in order to get to his train, and in doing so, on account of the ill-lighted condition of the station, fell over a switch and was injured, it was held that an action lay against the company (*Martin* v. *G. N. R. Co.*, 24 *L. J., C. P.* 209; *Burgess* v. *G. W. R. Co.*, 32 *L. T.* 76).

The principle to be gathered from these cases seems to be, that a guest or licensee who comes for his own pleasure must take the risk of any ordinary dangers attending it, but that one who comes on lawful business has a right to immunity from all but inevitable dangers.

Keeping Ferocious Animals. Rule 26.— If a man keep an animal knowing, either actually or impliedly, that it is ferocious or mischievous, an action will lie against him at the suit of any person injured by such animal, although there may have been no negligence in the securing of it.

The injuria or breach of duty consists in *knowingly* keeping a dangerous animal. This knowledge is called the scienter, and is the gist of the action.

Presumption of Scienter. Sub-rule.— *The scienter is irrebutably presumed where the animal is fierce by nature.*

Thus lions, bears, and such like animals, every man knows to be dangerous, and the owner of them

must keep them chained at his peril (*R.* v. *Huggins*, 2 *Ld. Raym.* 1583).

Where Scienter not presumed. Sub-rule (2).—*But if the animal be domesticated and of a nature not usually fierce, there is no such presumption, and the scienter must be proved.*

Thus dogs, oxen, horses, &c. doing harm must be proved to have been mischievous to the owner's knowledge in order to render him liable.

Proof. To do this it is not necessary to show that the animal has actually *committed* mischief before; a previous attempt to do so suffices (*Worth* v. *Gilling*, *L. R.*, 2 *C. P.* 1). Neither need such attempt have come to the personal knowledge of the defendant; a complaint made to the defendant's wife for the purpose of being communicated to her husband being evidence of scienter (*Gladman* v. *Johnston*, 36 *L. J.*, *C. P.* 153); and in the case of a corporation, notice to a competent employé is notice to the corporation (*Stiles* v. *Cardiff Steam Nav. Co.*, 33 *L. J.*, *Q. B.* 310).

Exceptions. (1) *Protection of Premises.*—No action lies for an injury arising from the defendant letting loose a dog in his own premises for their protection at night (*Brock* v. *Copeland*, 1 *Esp.* 203). But he must not put it in or near to the open approaches to his house, so as to injure persons lawfully coming to his house (*Sarch* v. *Blackburn*, *M. & M.* 505; and see *Lynch* v. *Nurdin*, 1 *Q. B.* 29; *Barnes* v. *Ward*, 9 *C. B.* 392).

(2) *Trespassers.*—A trespasser cannot maintain an action against the owner of a dog who has bitten him (*Sarch* v. *Blackburn, supra*).

(3) *Contributory Negligence.*—No action lies for injury caused by the defendant's dog if it arose from the plaintiff's carelessness, with knowledge of the danger (*ibid*).

(4) *Malice of another.*—No action lies against the owner if the injury be caused by the malice of a third party.

Thus where a stranger improperly loosed the defendant's dog and urged him to do mischief, it was held that the defendant was not liable (*Fleming* v. *Orr*, 2 *Macq. H. L. Ca.* 14).

Limitation. Rule 27.—Actions on the case for injuries to the person must be brought within the period of six years next after the cause of action arose.

Exception.—Where the injury has caused death any action brought by the personal representative under Lord Campbell's Act must be commenced within twelve calendar months, sect. 3.

CHAPTER VI.

Of Adultery and Seduction.

Section 1.

Adultery.

Nature of. Adultery is the having criminal intercourse with the wife or husband of another. As between man and wife the law under certain conditions gives a remedy by divorce, but of this it is not my intention here to treat. It also gives to an injured husband a further remedy.

Damages. Rule 28.—A husband may in a petition to the Divorce Court claim damages from any person on the ground of his having committed adultery with the wife of the petitioner (20 & 21 Vict. c. 85, s. 33).

Before the passing of the above Act the remedy which a husband had against the seducer of his wife was an action of criminal conversation, or "*crim. con.*" as it was usually called. That action is, however, now abolished, and the remedy indicated in the preceding rule substituted in its stead.

Mitigation of Damages. It is obvious that it is impossible to assess the damages in the case of adultery according to any scale calculated on the ground of giving compensation. It is in fact a wrong for which no adequate compensation can be given. The damages are therefore more properly regarded as in their nature penal, and accordingly vary very much according to more or less heinous circumstances of each case, in accordance with rule 27, Part 1.

Sub-rule.—*The amount of the damages depends upon the husband's circumstances and conduct, the terms upon which he and his wife lived together, and the wife's general character* (*Ad.* 899).

(1) Thus evidence of the wife's adultery with other men before the adultery with the co-respondent is admissible in reduction of damages, as showing that the petitioner has lost but a worthless wife (*Winter* v. *Henn*, 4 *C. & P.* 498; *Foster* v. *Foster*, 33 *L. J., P. & M.* 150, *n.*).

(2) And so is evidence that the marriage was kept secret, and that the defendant did not know of it (*Calcraft* v. *Earl of Harborough*, 4 *C. & P.* 501).

(3) So also are letters from the respondent to the co-respondent enticing him to commit the adultery (*Elsam* v. *Fawcett*, 2 *Esp.* 562).

Exceptions.—A petitioner will not be entitled to recover if he has been a party to his own dishonour, either by giving his wife a general licence to conduct

herself as she pleased with men generally, or by consenting to the particular adultery with the co-respondent, or by having permanently and totally given up all advantage to be gained from her society (*Alderson, B., Winter* v. *Henn*, 4 *C. & P.* 498), or by condoning the adultery (*Morris* v. *Morris*, 30 *L. J., M.* 111).

Thus encouraging a wife to live as a prostitute is a bar to damages for adultery with her (*Cibber* v. *Sloper cited*, 4 *T. R.* 655).

Such is a brief exposition of the law relating to a husband's remedies against the seducer of his wife. With regard to matrimonial wrongs as between husband and wife, they do not come within the scope of this work, being in my opinion certainly not torts, more probably wrongs ex contractu, but still more probably wrongs sui generis and unique.

Section 2.

Seduction and Injuries to Services.

Whence arising. An action lies by a master or parent against a person who deprives him of the services of his child or servant; and although this usually occurs through the debauching of such child or servant, yet it is by no means confined to that offence, for it equally lies against one who merely entices a servant away from his master, the gist of the action being the loss of service caused by the defendant's wrongful act.

Rule 29.—Every person designedly procuring a servant to depart from the master's

service during the stipulated period of service, or by harbouring such servant after quitting the master during such period, is liable to an action (*Lumley* v. *Gye*, 2 *Ell. & Bl.* 224; *Blake* v. *Lanyon*, 2 *T. R.* 221).

Thus, if I employed (against the will of his master) an apprentice or servant before the expiration of his term of service, I should be liable, for by so doing I should be affording him the means of keeping out of his master's service.

Contract of Service when implied. Sub-rule (1).—*In order to support an action for enticing away the plaintiff's servant, it is sufficient if a contract of service can be implied from the relation between the plaintiff and the alleged servant.*

Thus in *Evans* v. *Walton* (*L. R.*, 2 *C. P.* 615), the daughter of the plaintiff (a publican), who lived with him and acted as his barmaid, but without any express contract or wages, was induced by the plaintiff to leave her father's house: it was held, that the relation of master and servant might be implied from these circumstances, and that it matters not whether the service is at will or for a fixed period.

Sub-rule (2).—*If the defendant has gained anything from the servant's labour, the master may recover it* (*Foster* v. *Stewart*, 3 *M. & S.* 201).

Seduction and debauching of Daughter. The law recognizes no injury to a parent in the debauch-

ing of his daughter, and only gives him a remedy against the tempter on the ground of loss of service.

Rule 30.—An action for seduction cannot be maintained without proof of liability to service, and it is not sufficient to show that the plaintiff has incurred expense through the confinement of the girl; but it is not necessary to prove an actual contract or payment of wages (*Satterthwaite* v. *Dewhurst*, 5 *East*, 47 *n.*; *Bennet* v. *Allcott*, 2 *T. R.* 166).

(1) But small services suffice, such as milking, or even making tea (*Bennet* v. *Allcott* (supra); *Carr* v. *Clark*, 2 *Chit. R.* 261).

(2) And so where the daughter lived at and assisted in the duties of the house from six in the evening until seven in the morning, and the rest of the day was employed elsewhere: it was held sufficient evidence of service (*Rist* v. *Taux*, 32 *L. J.*, *Q. B.* 387); and where the daughter is a *minor* living with her father, service will be presumed (*Harris* v. *Butler*, 2 *M. & W.* 542).

(3) But where the daughter at the time of the seduction is acting as housekeeper to another person, the action will not lie (*Dean* v. *Peel*, 5 *East*, 45); not even when she partly supports her father (*Manley* v. *Field*, 29 *L. J.*, *C. P.* 79).

Relation of Master and Servant at Time of Seduction. Sub-rule.—*The relation of master and*

servant must exist at the time of the seduction (*Davies* v. *Williams*, 10 *Q. B.* 725).

Misconduct of Parent. Rule 31.—If the parent has introduced the daughter to, or has encouraged profligate or improper persons, or has otherwise courted his own injury, he has no ground of action (*Ad.* 906).

Thus where the defendant was received as the daughter's suitor, and it was afterwards discovered by the plaintiff that he was a married man, notwithstanding which he allowed the defendant to continue to pay his addresses to his daughter on the assurance that the wife was dying, and the defendant seduced the daughter: it was held, that the plaintiff had brought about his own injury, and had no ground of action (*Reddie* v. *Scoolt*, 1 *Peake*, 316).

Damages. Although the gist of the action is loss of service, yet the law somewhat inconsistently ordains that—

Rule 32.—Damages may be given for the loss which the plaintiff has sustained of the society and comfort of his child, and by the dishonour which he has received and the

anxiety and distress which he has suffered (*Bedford* v. *McKnowle*, 3 *Esp.* 120).

And this rule applies when the plaintiff is in loco parentis, as an aunt or adopted father (*Edmonson* v. *Machell*, 2 *T. R.* 4; *Irwin* v. *Dearman*, 11 *East*, 23).

Aggravated Damages. Sub-rule (1).—*Where more than ordinarily base methods have been employed by the seducer, the damages may be aggravated on that account.*

Thus if he make advances under the guise of matrimony, and being civilly received by the plaintiff, repays his kindness with this worst of insults, the damages will properly be exemplary (see judgt. *Tullidge* v. *Wade*, 3 *Wils.* 18).

Exception.—But a promise to marry is no aggravation, the breach of it being a distinct ground of action, having an appropriate remedy.

Mitigated Damages. Sub-rule (2).—*The defendant may show the loose character of the daughter in mitigation of damages* (*Ad.* 909; *Rose.* 799).

Thus the defendant may call witnesses to prove that they have had sexual intercourse with the girl previously to the seduction (*Eager* v. *Grimwood*, 16 *L. J., Ex.* 236; *Verry* v. *Watkins*, 7 *C. & P.* 308).

The damages for seduction are generally very large

and exemplary, and the court will seldom interfere with them on the ground of being excessive.

Limitation. An action for seduction, being an action of trespass on the case, must be commenced within six years (see 21 Jac. 1, c. 16, s. 3).

CHAPTER VII.

Of Trespass to Land and Dispossession.

Section 1.

Of Trespass quare clausum fregit.

Whence called. Trespass qu. cl. fr. consists in the breaking into another's close; and is so called because the law presumes that every man's land is enclosed by an actual or imaginary fence.

What constitutes. Rule 33.—Every unauthorized entry upon or direct interference with another's land is a trespass, for which an action lies without proof of actual damage.

(1) Thus driving nails into another's wall, or placing objects against it, are trespasses (*Lawrence* v. *Obee*, 1 *Stark.* 22; *Gregory* v. *Piper*, 9 *B. & C.* 591).

(2) So it is a trespass to allow one's cattle to stray on to another's land, unless there is contributory misconduct on his part, such as keeping in disrepair a hedge which he is bound by prescription or otherwise to repair (*Lee* v. *Riley*, 34 *L. J., C. P.* 212); but if no such duty to repair exists the owner of

cattle is liable for their trespasses even upon unin-closed land (*Boyle* v. *Tamlin*, 6 *B. & C.* 337), and for all naturally resulting damage.

(3) So if a person allow substances which he has brought on his land to escape into his neighbour's, an action lies without proof of negligence in the keeping of them.

Thus one bringing or collecting water upon his land does so at his peril, for if it escapes and injures his neighbour he is liable, however careful he may have been (*Fletcher* v. *Rylands*, *L. R.*, 1 *Ex.* 265; *Smith* v. *Fletcher*, *L. R.*, 7 *Ex.* 305); but where the water is naturally upon land the owner is only liable for negligence in keeping it.

Distress Damage feasant. It is convenient to mention here a peculiar remedy of landowners for trespasses committed by cattle, viz., by seizing the animals whilst trespassing and detaining them until compensation is made. This is not, however, available where animals are being actually tended; in such case the person injured must bring his action. A somewhat analogous remedy is allowed in the case of animals *ferœ naturæ* reared by a particular person. In such cases the law not recognizing any property in them does not make their owner liable for their trespasses, but any person injured may shoot or capture them while trespassing. Thus I may kill pigeons coming upon my land, but I cannot sue the breeder of them (*Hannam* v. *Mockett*, 2 *B. & C.* 939, per Bayley, J.).

Exceptions. (1) *Retaking Goods.*—If one takes another's goods on to his land the latter may enter and retake them (*Patrick* v. *Colerick*, 3 *M.* & *W.* 485); and

(2) *Cattle.*—If cattle escape on to another's land through the non-repair of a hedge which the latter is bound to repair, the owner of the cattle may enter and drive them out (see *Faldo* v. *Ridge*, *Yelv.* 74).

(3) *Distraining for Rent.*—So a landlord may enter his tenant's house to distrain for rent, or an officer to serve a legal process (*Keane* v. *Reynolds*, 2 *E.* & *B.* 748), but he may not break open the outer door of a house except to arrest under a warrant for felony, wounding, or breach of the peace (*Ad.* 708). So in any case where the law will imply leave, an entry is lawful.

(4) *Reversioner inspecting Premises.*—A reversioner of lands may enter in order to see that no waste is being committed.

(5) *Escaping Danger.*—A trespass is justifiable if committed in order to escape some pressing danger, or in defence of goods (*Ad.* 255).

(6) *Grantee of Easement.*—And the grantee of an easement may enter upon the servient tenement in order to do necessary repairs (*Taylor* v. *Whitehead*, 2 *Doug.* 745).

(7) *Public Rights.*—Land may be entered under the authority of a statute (*Beaver* v. *Mayor*, &c. *of Manchester*, 26 *L. J.*, *Q. B.* 311), or in exercise of a public right, as the right to enter an inn, provided there is accommodation (*Dansey* v. *Richardson*, 3 *E.* & *B.* 1859).

(8) *Liberum Tenementum.*—Lastly, land may be entered on the ground that it is the defendant's. This latter, known as the plea of liberum tenementum, is generally pleaded in order to try the title to lands.

Trespassers ab Initio. Rule 34.—(1) Whenever a person has authority given him by law to enter upon lands or tenements for any purpose, and he goes beyond or abuses such authority by doing that which he has no right to do, then, although the entry was lawful, he will be considered as a trespasser ab initio. (2) But where authority is not given by the law, but by the party, and abused, then the person abusing such authority is not a trespasser ab initio, but must be punished for his abuse. (3) The abuse necessary to render a person a trespasser ab initio must be a misfeasance, and not a mere nonfeasance (*Six Carpenters' case*, 1 *Sm. L. C.* 132).

Thus, in the above case, six carpenters entered an inn and were served with wine, for which they paid. Being afterwards at their request supplied with more wine they refused to pay for it, and upon this it was sought to render them trespassers ab initio, but without success; for although they had authority by law to enter (it being a public inn), yet the mere

non-payment, being a non-feasance and not a misfeasance, was not sufficient to render them trespassers.

Intention. Rule 35.—Absence of intention is no excuse for the commission of a trespass.

Thus where the defendant by mistake mowed the plaintiff's grass he was held to be a trespasser, although he had committed the trespass quite unintentionally (*Baseley* v. *Clarkson*, 3 *Lev.* 39).

Aggravation. But although absence of intention is no *excuse* for a trespass it has a very material effect upon the amount of damages which should be awarded.

Thus, in the above case, the damages would doubtless be limited to the value of the grass. But if the defendant had cut the grass wantonly, or if he had entered upon the plaintiff's land impertinently, wilfully and insultingly, the effect would be very different. In such a case the damages would be very properly exemplary damages, that is, damages in their nature penal or deterrent (see *Merest* v. *Harvey*, 5 *Taunt.* 443).

Possession necessary to maintain Trespass. In order to maintain an action of trespass the plain-

tiff must be in the possession of the land, for it is an injury to possession rather than to title.

RULE 36.—The possession of land suffices to maintain an action of trespass against any person wrongfully entering upon it; and if two persons are in possession of land, each asserting his right to it, then the person who has the title to it is to be considered in actual possession, and the other person is a mere trespasser (*Jones* v. *Chapman*, 2 *Ex.* 821).

Thus a person entitled to the possession of lands or houses cannot bring an action of trespass against a trespasser until he is in actual possession of them (*Ryan* v. *Clark*, 14 *Q. B.* 65), but when he has once entered he acquires the actual possession, and such possession then dates back to the time of the legal commencement of his right of entry, and he may therefore maintain actions against intermediate and then present trespassers (*Anderson* v. *Radcliff*, 29 *L. J., Q. B.* 128; *Butcher* v. *Butcher*, 7 *B. & C.* 402).

Onus of Proof of Title. Sub-rule (1).—*The onus lies upon a primâ facie trespasser to show that he is entitled to enter upon land in another's possession* (*Brown* v. *Dawson*, 12 *A. & E.* 624; *Asher* v. *Whitlock*, *L. R.*, 1 *Q. B.*).

Surface and Subsoil in different Owners. Where one parts with the right to the surface of land, re-

taining only the mines, he cannot maintain an action for trespass to the surface (*Cox* v. *Mouseley*, 5 *C. B.* 549), but he may for a trespass to the subsoil, as by digging holes, &c. (*Cox* v. *Glue*, 17 *L. J., C. P.* 162); so the owner of the surface cannot maintain trespass for a subterranean encroachment on the minerals (*Reyse* v. *Powell*, 22 *L. J., Q. B.* 305), unless the surface is disturbed thereby.

Highways, &c. Sub-rule (2).—*When one dedicates a highway to the public or grants any other easement on land, possession of the soil is not thereby parted with, but only a right of way or other privilege granted* (*Goodtitle* v. *Alder*, 1 *Burr.* 133; *and Northampton* v. *Ward*, 1 *Wils.* 114).

An action for trespasses committed upon it, as for instance, by throwing stones on to it or erecting a bridge over it, may be therefore maintained by the grantor (*Every* v. *Smith*, 26 *L. J., Ex.* 345).

Joint Owners. Rule 37.—Joint tenants, or tenants in common, can only sue one another in trespass for acts done by one inconsistent with the rights of the other.

(1) Among such acts may be mentioned the destruction of buildings (*Cresswell* v. *Hedges*, 31 *L. J., Ex.* 49), carrying off of soil (*Wilkinson* v. *Hagarth*, 12 *Q. B.* 837), and expelling the plaintiff from his occupation (*Murray* v. *Hall*, 7 *C. B.* 441).

(2) **Party Walls.** There is also one other important case of trespass between joint owners, viz., that arising out of a party wall. The law upon this subject is, that if one owner of the wall excludes the other owner entirely from his occupation of it, as by destroying it, or building upon it, for instance, he thereby commits a trespass; but if he pulls it down for the purpose of rebuilding it, he does not (*Stedman* v. *Smith*, 26 *L. J., Q. B.* 314; *Cubitt* v. *Porter*, 8 *B. & C.* 257).

Continuing Trespasses. Where a trespass is permanent and continuing, the plaintiff may bring his action as for a continuing trespass, and claim damages for the continuation; and where after one action the trespass is still continued, other actions may be brought until the trespass ceases (*Bowyer* v. *Cook*, 4 *C. B.* 236). But where the trespass consists in the entry and illegal possession of the land, although an action of trespass will lie, it becomes not only a trespass, but a dispossession, of which I shall treat in the next section.

Limitation. Rule 38.—All actions of trespass quare clausum fregit must be commenced within six years next after the cause of action arose (21 Jac. 1, c. 16, s. 3).

Section 2.

Of Dispossession.

Nature of. Dispossession, or ouster, may be simply defined as the wrongful withholding of the possession of land from the rightful owner. The specific remedy which the law gives for this injury, is the action of ejectment, brought against the wrongful occupier for the actual recovery of the possession; and herein it differs from the action of trespass, inasmuch as the latter only affords relief in damages.

Plaintiff's Title. Rule 39.—The claimant must recover on the strength of his own title, and not on the weakness of the defendant's (*Martin* v. *Strachan*, 5 *T. R.* 107).

Thus mere possession is primâ facie evidence of title, until the claimant makes out a better one (*Sweetland* v. *Webber*, 1 *Ad. & E.* 119).

Sub-rule (1).—*But where the claimant makes out a better title than the defendant, he may recover the lands, although such title may not be indefeasible.*

Thus where one enclosed waste land, and died without having had twenty years' possession, the heir of his devisee was held entitled to recover it against a person who had entered upon it without any title (*Asher* v. *Whitlock*, *L. R.*, 1 *Q. B.* 1).

Jus Tertii. Sub-rule (2).—*The defendant may*

set up the right of a third person to the lands, in order to disprove that of the claimant (*Doe* d. *Carter* v. *Bernard*, 13 *Q. B.* 945).

But the claimant cannot do the same, for possession is, in general, a good title against all but the true owner (*Asher* v. *Whitlock*, *supra*).

Exception. Landlord and Tenant.—Where the relation of landlord and tenant exists between the claimant and defendant, the landlord need not prove his title, but only the expiration of the tenancy, for a tenant cannot in general dispute his landlord's title (*Delaney* v. *Fox*, 26 *L. J., C. P.* 248), unless a defect in the title appears on the lease itself (*Saunders* v. *Merryweather*, 35 *L. J., Ex.* 115). But nevertheless he may show that his landlord's title has *expired*, by assignment, conveyance, or otherwise (*Doe* d. *Marriott* v. *Edwards*, 5 *B. & Ad.* 1065).

The principle does not extend to the title of the party through whom the defendant claims prior to the demise or conveyance to him. Thus where the claimant claims under a grant from A. in 1818, and the defendant under a grant from A. in 1824, the latter may show that A. had no legal estate to grant in 1818 (*Doe* d. *Oliver* v. *Powell*, 1 *A. & E.* 531; 3 *A. & E.* 188).

Legal Estate. Rule 40.—The claimant's title must be legal, and a mere equitable interest is insufficient.

Thus where a copyhold has been assigned by deed but no surrender made, the assignee cannot bring ejectment against the assignee's representatives (*Doe* d. *North* v. *Webber*, 3 *N. C.* 922).

Limitation. Rule 41.—No person shall bring an action of ejectment but within twenty years after the right to maintain such action shall have accrued to the claimant, or to the person through whom he claims (3 & 4 *Will.* 4, *c.* 27, *s.* 2; *Brassington* v. *Llewellyn*, 27 *L. J.*, *Ex.* 297).

Exceptions. (1) *Disability.*—Where claimants are under disability, by reason of infancy, coverture, unsound mind, or absence beyond the seas, they must bring their action within ten years after such disability has ceased, provided that no action shall be brought after forty years from the accrual of the right (sects. 16 and 17).

(2) *Acknowledgment of Title.*—When any person in possession of lands or rents shall have given an acknowledgment in writing, and signed by him, to the person entitled to such lands or rents, or to his agent, of his title, then the possession of the person by whom such acknowledgment shall have been made shall be deemed to be the possession of the person to whom such acknowledgment shall have been given, and the right of such last-mentioned person shall be taken to have accrued at and not before the date at

which such acknowledgment was made, and the statute shall begin to run as from that date (*Ley* v. *Peter*, 27 *L. J., Ex.* 239).

(3) *Ecclesiastical Corporations.*—The period in the case of ecclesiastical and eleemosynary corporations is sixty years (sect. 29).

Commencement of Period of Limitation. Sub-rule (1).—*The right to maintain ejectment accrues at the time of dispossession or discontinuance of possession of the profits or rent of lands, or of the death of the last rightful owner* (*see sect.* 3).

It seems that discontinuance does not mean mere abandonment, but rather an abandonment by one followed by actual possession by another (*see Smith* v. *Lloyd*, 23 *L. J., Ex.* 194; *Ad., Cap. VI. Sect.* 2).

Thus where A. grants the surface of lands to B., and the mines thereunder to C., and C. does not enter for more than forty years, yet his right is not barred; for although he has not been in possession for forty years, yet there has been no adverse possession by another (*see Smith* v. *Lloyd*, 9 *Ex.* 571).

Occupation of Servants. The occupation of a servant is that of his master; therefore where a landowner allows his gardener to use a cottage rent free, such permission is not a discontinuance of possession, and no title can be gained by the gardener by twenty years' possession (*Ad.* 262); and so allowing another from kindness to occupy one's tenement is not necessarily a discontinuance, if one continues to exercise proprietary rights, as of repairing or planting, &c. (*Turner* v. *Doe*, 9 *M. & W.* 645).

Continual Assertion of Claim. Sub-rule (2).—*No defendant is deemed to have been in possession of land merely from the fact of having entered upon it; and, on the other hand, a continual assertion of claim preserves no right of action* (*sects.* 10 *and* 11).

Therefore a man must actually bring his action within the time limited; for mere assertion of his title will not preserve his right of action after twenty years' adverse possession.

CHAPTER VIII.

Of Private Nuisances affecting Realty.

Definition. "A private nuisance," says Blackstone, "is anything done to the hurt or annoyance of the lands, tenements, or hereditaments of another not amounting to trespass." It may either affect corporeal property or incorporeal rights.

Nuisances to Corporeal Hereditaments. Rule 42.—Any act or omission of a person whereby sensible injury is caused to the property of another, or whereby the comfort of human existence in such property is materially interfered with, is actionable.

(1) **Fumes.** Thus in the case of *Tippings* v. *St. Helen's Smelting Co.* (*L. R.*, 1 *Ch.* 66), the fact that the fumes from the company's works killed the plaintiff's shrubs was held sufficient to support the action, for the killing of the shrubs was an injury to the property.

(2) **Noisy Trade.** So, too, a noisy trade is a legal nuisance if it interfere with the reasonably

comfortable occupation of a house (*Crump* v. *Lambert, L. R.*, 3 *Eq.* 409).

Other Examples. Other examples of nuisance to corporeal hereditaments are overhanging eaves from which the water flows on to another's property (*Battishill* v. *Reed*, 25 *L. J., C. P.* 290); or overhanging trees, or pigstys creating a stench erected near to another's house (*Rosc.* 655); and it would seem that noisy dogs preventing the plaintiff's family from sleeping are nuisances, if the jury find that such discomfort is caused, although where the jury find that no serious discomfort has arisen the court will not interfere (*Street* v. *Gugwell, Selwyn's N. P.*, 13*th ed.* 1090; *and see Rosc.* 655).

Reasonableness of Place. Sub-rule (1).—*Where an act is proved to interfere with the comfort of an individual so as to come within the legal definition of a nuisance, it cannot be justified by the fact that it was done in a reasonable place* (*Bamford* v. *Turnley*, 31 *L. J., Q. B.* 286).

Thus where the defendant made bricks upon his own land for the purpose of building thereon, and every precaution had been taken, and the jury found that the act complained of was merely a reasonable use of his own land by the defendant, yet the majority of the court set the verdict aside (*Ibid.*).

But the discomfort must be a material interference with physical comfort, not merely according to dainty modes and habits of living, but according to plain,

sober and simple notions amongst English people (*Knight Bruce, V. C., Walter* v. *Self*, 4 *De G. & Sm.* 323).

Prescription. Sub-rule (2).—*If a noisome trade has been carried on for twenty years, a prescriptive right is thereby gained to carry it on in that particular spot* (*Elliottson* v. *Feetham*, 2 *B. N. C.*), *but not otherwise.*

Therefore unless such prescriptive right has been acquired, it is no justification that the plaintiff came to live near the nuisance. "It used to be thought that if a man knew that there was a nuisance and went and lived near it he could not recover, because it was said it is he that goes to the nuisance and not the nuisance to him. That, however, is not law now" (per Byles, J., *Hole* v. *Barlow*, 27 *L. J., C. P.* 208.

Injuries to Incorporeal Hereditaments. Besides injuries to the right of property in land there are certain nuisances which are hurtful not to the land itself, but to the exercise of certain rights either incident to the ownership of land, or acquired in connection with it by grant, prescription, or custom. Such rights may be divided into two classes, namely, (1) easements, and (2) profits à prendre.

Easements. An easement is the benefit or privilege of using the land of another for a particular purpose, which user is unconnected with any property or interest in the land itself. Thus a right of

way across another's land is an easement. The property to which the right is attached is called the dominant tenement; that over which the right is exercised is called the servient tenement, and the burden of the easement itself is frequently denominated a servitude.

Some servitudes are ex jure naturæ attached to all land; some, on the other hand, can only be imposed by custom, prescription or grant.

Profits a prendre. Profits à prendre differ from mere easements in this, that whereas an easement gives no right to any of the profits of the land; a profit à prendre on the contrary consists in the right to take certain of the produce of another's land. The right of pasturage on and of shooting over land of another, and the right of common, are instances of profits à prendre.

A profit à prendre can only arise from express grant or by prescription, and in general cannot arise from custom; but this is much modified, particularly in the case of commonable rights.

Custom. Custom, in the legal sense of the word, is a usage which has by long and immemorial continuance obtained the force of law in a particular locality. Such a custom is binding only when it is reasonable; and by this I do not mean to say that it will be held unreasonable on account of causing inconvenience to a particular individual. But where its exercise causes general and real inconvenience it will be held void (*Tanistry's case, Co. Litt.* 113 *a*).

Having thus shortly explained the meaning of the terms easement, profit à prendre, and custom, I will now proceed to examine the wrongs which may be suffered in respect of them.

Lateral Support. Rule 43.—Every owner of property has a right to lateral and subjacent support for his land in its original state (*Humphrey* v. *Brogden*, 12 *Q. B.* 739). But where the lands are burdened with erections no such right exists unless acquired by grant or prescription (*Wyatt* v. *Harrison*, 3 *B. & A.* 871).

(1) Thus if in excavating my land or working my mines I cause the subsidence of my neighbour's land, or of that of the owner of the surface, I shall be liable for such injury (*Hunt* v. *Peake*, 29 *L. J., Ch.* 785: *Rowbotham* v. *Wilson*, 30 *L. J., Q. B.* 49).

(2) But if the owner of the surface builds upon it, there is no natural obligation upon the owner of the minerals to leave sufficient support for the houses, provided that he leaves such an amount of support as would be sufficient to sustain the surface if unburdened by the buildings (*Backhouse* v. *Bonomi*, 9 *H. L. C.* 503).

(3) But where houses have enjoyed the support for twenty years, they will have gained a prescriptive right to it, and therefore the owner of the mines must in such a case leave sufficient support for them (*Hunt* v. *Peake*, 29 *L. J., Ch.* 785).

(4) So there is no natural duty upon the owner of an adjoining house to give lateral support to that of his neighbour, and if by taking his house down he causes the fall of his neighbour's, he will not be liable (*Paton* v. *London*, 9 *B.* & *C.* 725). But if the houses were originally built together, on land belonging to the same owner, or if they have enjoyed each other's support for twenty years, a grant of mutual support will be implied (*Richards* v. *Rose*, 30 *L. J.*, *Q. B.* 49; *and see Brown* v. *Robins*, 28 *L. J.*, *Ex.* 250).

Exception.—Companies governed by the Railway Clauses Consolidation Act, 1845, do not acquire any such right to subjacent support by purchasing the surface; and the owners of the mines may, after having given notice to the company, so as to give them the opportunity of purchasing the mines, work them with impunity, in the ordinary way (*G. W. R. Co.* v. *Bennett*, *L. R.*, 2 *H. L.* 29. But neither will an action lie against the company for any damage suffered by the mine owner, although perhaps he may demand compensation under the act (*see Dunn* v. *Birm. Canal Co.*, *L. R.*, 8 *Q. B.* 42).

Annihilation of Right by Contract. It seems, too, that the owner of the surface may put an end to the right of support by express contract in the deed conveying the subsoil, which will bind both himself and his assigns (*Rowbotham* v. *Wilson*, 30 *L. J.*, *Q. B.* 965). And so may a lateral proprietor make it a condition of sale that he shall not be liable for

subsidence caused by working his mines (*Murchie* v. *Black*, 34 *L. J., C. P.* 337; but see *Richards* v. *Harper*, *L. R.*, 1 *Ex.* 199).

Light and Air. There is no right, ex jure naturæ, to the free passage of light and air to a house or building; but such a right may be acquired, either by grant from the contiguous proprietors, or by prescription.

Rule 44.—Where the access and use of light to any building shall have been actually enjoyed therewith for twenty years without interruption, the right thereto shall be deemed indefeasible, unless it shall appear that the same was enjoyed by consent or agreement in writing (2 & 3 Will. 4, c. 71, s. 3).

By section 6 it is enacted that there shall be no presumption of title to light and air unless it has been enjoyed for twenty years (*Lanfranchi* v. *Mackenzie*, *L. R.*, 4 *Eq.* 421).

Therefore when the owner of a house or other building alters or enlarges his ancient windows, he does not gain any right thereby to a greater amount of light, for the enlarged portion is considered to be a new window; but if the window be restored to its ancient size, a court of equity will restrain a person who has obstructed it from continuing to do so (*Cooper* v. *Hubbock*, 31 *L. J., Ch.* 123).

The obstruction of an ancient light being a dam-

num per se, no proof of actual damage is necessary; whence it follows that a person does not lose his right to relief because a darkened light is necessary for the trade which he is then pursuing (*Yates* v. *Jack*, *L. R.*, 1 *Ch.* 295); nor because he has partly obstructed his own light (*Arcedeckne* v. *Kelk*, 2 *Giff.* 683); nor because of the pulling down of other buildings in the neighbourhood he in reality has more light than he was originally entitled to.

Exception. Right over Grantor's Land.—A man cannot derogate from his own grant.

Therefore if one grants a house to A., but keeps the land adjoining the house in his own hands, he cannot build upon that land so as to darken the windows of the house. And if he have sold the house to one and the land to another, the latter stands in the grantor's place as regards the house (see per Bayley, J., *Canham* v. *Fisk*, 2 *Cr. & J.* 128).

But where the relations are reversed, and the grantor sells the land but retains the house, there is no duty upon the grantee of the land to abstain from building upon it, and the grantor cannot prevent him, for to do so would be as much as in the preceding case a derogation from his own grant (*White* v. *Bass*, 31 *L. J., Ex.* 283).

Uninterrupted Enjoyment. Sub-rule (1).—*No act or other matter shall be deemed to be an interruption, unless the same shall have been submitted to for one year after the party interrupted shall have had notice thereof, and of the person making or authorizing the same* (*sect.* 4).

Thus where the use of light and air had been

enjoyed for 19 years and 330 days, and was then interrupted for 35 days, this was held to be no valid interruption to the right by prescription (*Flight* v. *Thomas*, 11 *A. & E.* 699.)

Actual Enjoyment. Sub-rule (2). — *Personal occupation is not essential to actual enjoyment.*

Thus where there have been windows through which light has passed for twenty years, it is immaterial that there has been no personal occupation (*Courtauld* v. *Legh*, *L. R.*, 4 *Ex.* 126).

Estoppel in case of Disturbance in pursuance of Licence. Sub-rule (3).— *If the owner of the dominant tenement authorizes the owner of the servient tenement, either verbally or otherwise, to do an act of notoriety upon his land, which when done will affect or put an end to the enjoyment of the easement, and such act is done, the licensor cannot retract, but must abide by the result.*

Thus where A. had a right to light and air across the area of B., and gave B. leave to put a skylight over the area, which B. did: it was held that A. could not retract his licence, although it was found that the skylight obstructed the light and air (*Winter* v. *Brockwell*, 8 *East*, 309).

Unity of Possession of Dominant and Servient Tenement. Rule 45.—The enjoyment of light being considered as an easement can only be established by prescription when the dominant and servient tenement are possessed by different owners.

Thus where windows of the plaintiff had received light for twenty years, but his and the defendant's premises had been owned by the same person until six years before the action, when they had been separately sold, it was held that he had no prescriptive right to light, because the easement did not commence until the properties had been separated (*White* v. *Bass*, 31 *L. J., Ex.* 283).

Disturbance of Watercourse. Rule 46.—The right to the use of the water of a natural stream belongs jure naturæ and of right to the owners of the adjoining lands, every one of whom has an equal right to use the water which flows in the stream, and consequently no proprietor can have the right to use the water to the prejudice of any other proprietors (*Chasemore* v. *Richards*, 7 *H. L. Ca.* 349; *Wright* v. *Howard*, 1 *S. & S.* 203; *Dickenson* v. *Gr. Junc. Canal Co.*, 7 *Ex.* 299).

(1) Every riparian owner may reasonably use the stream, as, for instance, for drinking, watering his cattle or turning his mill, and other purposes, provided he does not thereby seriously diminish the stream. In short, it is a question entirely of degree, and depends upon the fact whether or not an injury is caused by his user to the remaining proprietors (*see Embrey* v. *Owen*, 6 *Ex.* 353).

(2) If the rights of a riparian proprietor are interfered with, as by diverting the stream or abstracting or fouling the water, he may maintain an action against the wrongdoer, even though no actual damage has been sustained (*Wood* v. *Waud*, 3 *Ex.* 748; *Embrey* v. *Owen*, 6 *Ex.* 369; *Crossley* v. *Lightowler*, *L. R.*, 2 *Ch.* 478).

Penning back Water. Besides the natural right which every riparian proprietor has to the ordinary user of the water of a stream, and immunity from disturbance of that right by the riparian proprietors higher up the stream, he has also a right to have the water conveyed along the watercourse out of his lands, and immunity from disturbance of this right by riparian proprietors lower down the stream.

Sub-rule.—*If by means of impediments placed in or across a stream a riparian proprietor causes the stream to flood the lands of a proprietor higher up the stream, he will be liable for damages resulting therefrom; and equally if a higher proprietor collects water and pours it into the watercourse in a body, and so floods the lands of a proprietor lower down the stream, he will be liable for damage resulting therefrom* (*Chasemore* v. *Richards*, 7 *H. L. C.* 349; *Sharpe* v. *Hancock*, 8 *Sc. N. R.* 46).

Exception. Prescriptive Rights.—Rights in derogation of those of the other riparian proprietors may be gained by grant or prescription (*Acton* v. *Blundell*, 12 *M. & W.* 353; *Carlyon* v. *Lavering*, 1 *H. & N.* 784; 26 *L. J., Ex.* 251); but as they are

acquired in the same manner as a right of way they will be noticed under that head.

Artificial Watercourses. RULE 47.—An artificial watercourse may have been originally made under such circumstances, and have been so used, as to give all the rights which a riparian proprietor would have had if it had been a natural stream (per Wightman, J., *Sutliffe* v. *Boothe*, 32 *L. J., Q. B.* 136).

(1) Where a loop had been made in a stream, which loop passed through a field A., it was held that the grantee of A. became a riparian proprietor in respect of the loop (*Nuttall* v. *Bracewell, L. R.*, 2 *Ex.* 1).

(2) But where the watercourse is merely put in for a temporary purpose, as for drainage of a farm, or the carrying off of water pumped from a mine, a neighbouring landlord, benefited by the flow from the drain or stream, cannot sue the farmer or mine owner for draining off the water, even after fifty years' enjoyment (*Greatrex* v. *Hayward*, 8 *Ex.* 291).

Discharging Water on to another's Land. A right to discharge water on to another's land may be acquired by grant or prescription, but it is a rule that—

RULE 48.—A person having a right to discharge pure water on to the land of another, has no right to discharge water in a polluted state (*Magor* v. *Chadwick*, 11 *A. & E.* 571).

Private Rights of Way. These may be acquired in general, either by (1) grant, (2) necessity, or (3) prescription. The first rather comes under the head of wrongs ex contractu than ex delicto. I shall, therefore, at once pass on to those arising out of necessity or implication.

RULE 49.—Whenever one grants land to another, to which there is no other access, the law gives to the grantee a right of way over the grantor's land (*Ad.* 83; *Gayford* v. *Moffat, L. R.*, 4 *Ch.* 133).

So where one having two fields, the only access to one of which lies through the other, sells this latter, the law reserves to him a right of way over it (*Pinnington* v. *Galland*, 22 *L. J., Ex.* 349).

Sub-rule.—*When the necessity ceases the right ceases, but the right revives again when the necessity revives* (*Holmes* v. *Goring*, 2 *Bing.* 76; *Pearson* v. *Spencer*, 1 *B. & S.* 584).

Therefore when by a subsequent purchase a man can approach his land without going over that of his neighbour, his right to do so ceases; but upon the re-sale of such subsequent purchase the right revives.

Prescriptive Right. Before the Prescription Act an immemorial grant was always presumed from twenty years' uninterrupted enjoyment of a right, but if the commencement of such enjoyment could be shown this presumption was rebutted. To remedy this the following rule was enacted:—

Rule 50.—No claim which may be lawfully made at common law by custom, prescription, or grant, to any way or other easement, or the use of any water, to be enjoyed upon, over or from any land or water when such way or other water shall have been actually enjoyed by any person claiming the right thereto for the period of twenty years, shall be defeated or destroyed by showing only that such way, water, or other matter, was first enjoyed within the time of legal memory; but, nevertheless, such claim may be defeated in any other way by which the same was always liable to be defeated, and when such way or other matter shall have been so enjoyed for the full period of forty years the right thereto shall be deemed absolute and indefeasible, unless it shall appear that the same was enjoyed by some consent or agreement by deed or writing (2 & 3 Will. 4, c. 71, s. 2).

Sub-rule (1).—*The enjoyment must be as of right* (*sect.* 5).

Therefore if it has been enjoyed either by force or secrecy, or occasionally only, twenty years' user will not avail (*Garrod* v. *Martyn*, 34 *L. J., C. P.* 357); nor if the user was by permission or contract; nor if there was unity of possession of the dominant and servient tenement within the period (*Winship* v. *Hudspeth*, 23 *L. J., Ex.* 268). Therefore a tenant cannot acquire by prescription an ease-

ment over land of his landlord; the occupation of the tenant being that of the landlord (*Gayford* v. *Moffat*, *L. R.*, 4 *Ch.* 133). And, in fact, any circumstances which tend to rebut the presumption of a grant, and to prove that no grant could ever have lawfully existed, are admissible to show that there was no enjoyment as of right (*Ad.* 114; *Mill* v. *New Forest Co.*, 23 *L. J.*, *C. P.* 215). Thus an enjoyment by the acquiescence of a tenant without his landlord's knowledge is no enjoyment as of right (*Warburton* v. *Parke*, 26 *L. J.*, *Ex.* 299; 2 *H. & N.* 64).

Sub-rule (2).—*When the serviem tenement is held under any term of life or years exceeding three years, the time of the enjoyment of the way, water or watercourse during such term shall be excluded in the computation of the forty years in case the claim shall within three years after the determination of such term be resisted by the reversioner.*

Sub-rule (3).—*The suspension by agreement of a right of way does not extinguish it.*

Thus if there be ten years' user of a way, and then a cessation for ten years by temporary agreement, this may yet be a sufficient enjoyment for twenty years to satisfy the statute (*Payne* v. *Shedden*, 1 *Mood. & Rob.* 383).

Disturbance of Common. This happens when any act is done by which the right of another to his common is incommoded or diminished (*Steph. Comm.*, bk. v. c. viii.) There are three different conditions under which this wrong may be suffered, viz.—

(1) Where the wrongdoer having no right of

common, puts beasts on the land; or, having such right, puts uncommonable ones on to it.

(2) Where a commoner surcharges or puts more beasts on the common than he is entitled to put; and

(3) Where the wrongdoer encloses or obstructs the common.

Prescription. Rule 51.—The lord may by prescription put a stranger's cattle into the common, and also by a like prescription for common appurtenant cattle that are not commonable may be put into the common (*Steph. Comm.*, bk. v. c. viii.)

If, however, no such prescription exists the cattle of a stranger, or the uncommonable cattle of a commoner, may be driven off, or distrained damage feasant, or their owner may be sued either by the lord or a commoner.

N.B.—The rule as to the period necessary to acquire prescriptive commonable rights is similar to that (rule 50, Part 2) applicable to the rights of way, &c.; with this difference, that the periods are thirty and sixty years instead of twenty and forty (2 & 3 Will. 4, c. 71, s. 1); and also the first sub-rule to rule 44, relating to uninterrupted enjoyment, applies to prescriptive right of common.

Surcharging. This generally happens where the right of common is appendant, that is to say, where the common is limited to beasts that serve the plough or manure the land, and are levant and couchant on the estate; or where it is appurtenant, that is to say,

where there is a right of depasturing a limited number of beasts upon the common, which number is taken to be the number which the land in respect of which the common is appurtenant is capable of supporting through the winter if cultivated for that purpose (*Can* v. *Lambert, L. R.*, 1 *Ex.* 168). A common in gross can only arise from express grant to a particular person and his heirs, and, having no connection with his land, the number of commonable beasts, unless expressly limited by the grant, is indefinite and *sans nombre.*

Rule 52.—Common appendant and appurtenant being limitable by law, a commoner surcharging the common commits a wrong for which the lord may distrain the beasts surcharged or bring an action, and any commoner may also bring an action, whether the surcharger may be the lord or another commoner (*Steph. Comm.*, bk. v. c. viii.)

Obstruction. The common being free and open to all having commonable rights over it, it follows that—

Rule 53.—When the owner of the land or some other person so encloses or otherwise obstructs it that the commoner is precluded from enjoying the benefit to which he is by law entitled, the commoner may maintain an action (*Steph. Comm.*, bk. v. c. viii.)

This may happen either by enclosing the land or ploughing it up, or driving off the cattle, or making a warren and so stocking it that the rabbits eat up all the herbage. The lord may, however, lawfully make a warren if the rabbits be so kept under as not to occasion this wrong (*Ibid.; and Bullen* v. *Langdon*, *C. Eliz.* 876).

Other Disturbances. There are certain other kinds of disturbances, for which I must refer you to the larger works.

Such are disturbance of patronage, pews, franchise, and tenure.

Remedy by Abatement. The law gives a peculiar remedy for nuisances by which a man may right himself. This remedy is called abatement, and consists in the removal of the nuisance.

Rule 54.—A nuisance may be abated by the party aggrieved thereby, so that he commits no riot in the doing of it, nor occasions, in the case of a private nuisance, any damage beyond what the removal of the inconvenience necessarily requires (*Steph. Comm.*, bk. v. c. i.); but a man cannot enter a neighbour's land to prevent an apprehended nuisance (*Ad.* 188).

(1) Thus if my neighbour build a wall and obstruct my ancient lights, I may, after notice and

request to him to remove it, enter and pull it down (*R.* v. *Rosswell*, 2 *Salk.* 459); but this notice should always be given (*Davies* v. *Williams*, 16 *Q. B.* 556).

(2). But where the plaintiff had erected scaffolding in order to build, which building when erected would have been a nuisance, and the defendant entered and threw down the scaffolding, such entry was held wholly unjustifiable (*Norris* v. *Baker*, 1 *Roll. Rep.* 393, *fol.* 15).

(3) Obstructions to watercourses may be abated by the party injured, whether by diminution or flooding (*Roberts* v. *Rose*, *L. R.*, 1 *Ex.* 82).

(4) A commoner may abate an encroachment on his common, such as a house (*Davies* v. *Williams*, *supra*), or fence obstructing his right (*Mason* v. *Cæsar*, 2 *Mod.* 66), but he cannot abate a warren however great a nuisance, but must appeal to a court of justice (*Cooper* v. *Marshall*, 1 *Burr.* 226).

Summary Proceedings. Certain acts, such as the Nuisances Removal Act, 18 & 19 Vict. c. 121, enable summary proceedings to be taken before magistrates, who are empowered to order the abatement, or prohibit the continuance of nuisances affecting the public health (*Amys* v. *Creed*, *L. R.*, 4 *Q. B.* 122).

Some other acts contain like powers, notably the Smoke Prevention Act (16 & 17 Vict. c. 128), the Public Health and Local Government Act (21 &

22 Vict. c. 98), and the Metropolitan Building Act (18 & 19 Vict. c. 122).

Remedy by Injunction. Besides an action for damages, a court of equity could always, and now by the Common Law Procedure Act, a court of law can grant a writ of injunction, restraining the defendant from a repetition or continuance of any nuisance or disturbance. This writ is enforced, if necessary, by attachment.

Rule 55.—An injunction may be obtained from a court of equity in a variety of cases to restrain the adverse party in the suit from committing any acts in violation of the plaintiff's rights (4 *Steph. Comm.* 45).

Thus when a proposed building would obstruct an easement, so as to entitle the plaintiff to substantial damages at law, an injunction will be granted to restrain the building (*Kelk* v. *Pearson*, 23 *L. T., N. S.* 458).

This case is a very good illustration of the value of an injunction, for, inasmuch as the injury would not occur until the buildings might be erected, so no action would lie, nor would it be lawful to abate a merely prospective nuisance. But by means of an injunction the erection of the buildings may be at once stopped.

It may be mentioned, that the courts of common

law may now, in certain cases, and as *incidental* to an action, grant an injunction (17 & 18 Vict. c. 125, ss. 79—82).

Remedy of Reversioners. RULE 56.—Whenever any wrongful act is necessarily injurious to the reversion to land, or has actually been injurious to the reversionary interest, the reversioner may sue the wrongdoer (*Bedingfield* v. *Onslow*, 1 *Saund.* 322).

(1) Thus opening a new door in a house may be an injury to the reversion, even though the house is none the worse for the alteration; for the mere alteration of property may be an injury (*Young* v. *Spencer*, 10 *B.* & *C.* 145, 152).

(2) So if a trespass be accompanied with an obvious denial of title, as by a public notice, that would probably be actionable (see judgment, *Dobson* v. *Blackmore*, 9 *Q. B.* 991).

(3) So the obstruction of an incorporeal right, as of way, air, light, water, &c., may be injuries to the reversion (*Kidgell* v. *Moore*, 9 *C. B.* 364; *Met. Ass.* v. *Petch*, 27 *L. J., C. P.* 330; *Greenslade* v. *Halliday*, 6 *Bing.* 379).

Sub-rule (1).—*The action will not lie for a trespass or nuisance of a mere transient and temporary character* (*Baxter* v. *Taylor*, 4 *B.* & *Ad.* 72).

Thus a nuisance arising from noise or smoke will not support an action by the reversioner (*Mumford*

v. *O. W. & W. R. Co.*, 26 *L. J., Ex.* 265; *Simpson* v. *Savage*, 26 *L. J., C. P.* 50).

Sub-rule (2).—*Some injury to the reversion must always be proved, for the law will not assume it from any acts of the defendant* (*Kidgell* v. *Moore*, *sup.*).

CHAPTER IX.

Of Trespass to and Conversion of Chattels.

General Rule. Rule 57.—Every direct forcible injury, or act disturbing the possession of goods without the owner's consent, however slight or temporary the act may be, is a trespass; and if the trespass amount to a deprivation of possession to such an extent as to be inconsistent with the rights of the owner, (as by taking, using or destroying them), it then becomes a wrongful conversion (*Foulkes* v. *Willoughby*, 8 *M. & W.* 540; *Borroughs* v. *Bayne*, 29 *L. J.*, *Ex.* 185).

(1) **Animals.** Thus beating or otherwise ill using the plaintiff's dogs is a trespass (*Dand* v. *Sexton*, 3 *T. R.* 37), and it is immaterial that the injury was not the immediate result, but the consequence of the defendant's act; for every man must be held responsible for the probable consequence of his acts. Thus, where the defendant looses a dangerous animal, knowing of its ferocious disposition, and the animal injures another animal, an action of trespass is maintainable against the defendant (*Leame* v. *Bray*, 3 *East*, 595).

(2) So is an illegal distress, or any other mode of

seizing and taking goods; as, for instance, the taking away a tombstone erected by the plaintiff (*Spooner* v. *Brewster*, 3 *Bing.* 136).

(3) So if one lawfully having the goods of another for a particular purpose destroy them, he is guilty of trespass and conversion (*Cooper* v. *Willomat*, 1 *C. B.* 692).

(4) So if a sheriff sells more goods than are sufficient to satisfy an execution, he will be liable for a conversion of those in excess (*Aldred* v. *Constable*, 6 *Q. B.* 381).

(5) **Game.** So if A. starts a hare in the ground of B., and hunts it and kills it there, it is a trespass; for so long as the hare is upon A.'s land it is A.'s property (*Sutton* v. *Moody*, 1 *Ld. Raym.* 250). So rabbits bred in a warren are the property of the breeder so long as they stay in his land, but not after they have left it (*Hadesden* v. *Gryssel*, *Cro. Jac.* 195).

(6) And so when the plaintiff granted a lease to the defendant, excepting the trees and herons building therein, and the defendant shot the herons, the plaintiff was held entitled to recover; for, although herons are *feræ naturæ*, and incapable whilst free of being absolutely owned, yet, so long as they remained in the trees of the plaintiff they were his property (*Bishop of London's case*, 14 *Hen.* 8).

(7) The purchase of goods, which the vendor had no right to sell, accompanied by taking possession, is a conversion by the purchaser as against the real owner, even though the purchaser was unaware that

the vendor had no authority; for want of intention is no excuse (*Hilbery* v. *Hatton*, 33 *L. J., Ex.* 190).

Trespasses of Dogs. Sub-rule.—*The owner of every dog is liable in damages for injury done to any cattle or sheep by his dog, without proof of scienter or negligence; and if the damages claimed are less than 5l. they may be recovered summarily before a justice or justices sitting at petty sessions* (28 & 29 Vict. c. 60, s. 1).

The word cattle has been held to include horses (*Wright* v. *Pearson*, *L. R.*, 4 *Q. B.* 582). But if game is destroyed by a dog, an action lies by the owner of land on which it was destroyed, *only* on proof of scienter; for the statute did not alter the common law with respect to game.

Exceptions. (1) *Plaintiff's Fault.*—It is a good justification that the trespass was the result of the plaintiff's own negligent or wrongful act.

Thus, if he place his horse and cart so as to obstruct my right of way, I may remove it, and use, if necessary, force for that purpose (*Slater* v. *Swann*, 2 *St.* 892). So, if his cattle or goods trespassing on my land get injured, he has no remedy (*Turner* v. *Hunt*, *Brownl.* 220), unless I use an unreasonable amount of force, as, for instance, by chasing trespassing sheep with a mastiff dog (*King* v. *Rose*, 1 *Freem.* 347).

So, if a man wrongfully takes my garment and embroiders it with gold, I may retake it; and if

J. T. have a heap of corn, and J. D. will intermingle his corn with the corn of J. T., the latter shall have all the corn, because this was done by J. D. of his own wrong (Coke, C. J., in *Ward* v. *Eyre*, 2 *Bulstr.* 323). And likewise if one takes away my carriage, and has it painted anew without my authority, I am entitled to have the carriage without paying for the painting (*Hiscox* v. *Greenwood*, 4 *Esp.* 174).

(2) *Defence of Property.*—A trespass committed in defence of property is justifiable.

Thus a dog chasing sheep or deer in a park, or rabbits in a warren, may be shot by the owner of the property in order to save them, but not otherwise (*Wells* v. *Head*, 4 *C.* & *P.* 568).

But a man cannot justify shooting a dog, on the ground that it was chasing animals *ferœ naturæ* (*Vere* v. *Lord Cawdor*, 11 *East*, 569), unless it was chasing game in a preserve, in which case it seems that it may be shot in order to preserve the game, but not after the game are out of danger (*Reade* v. *Edwards*, 34 *L. J.*, *C. P.* 31, *and Ad.* 359).

(3) *Self-defence.*—A trespass committed in self-defence is justifiable.

Thus to kill another's dog whilst in the act of attacking the defendant is justifiable, but not otherwise.

(4) *In Exercise of Right.*—A trespass committed in exercise of a man's own rights is justifiable (*Ad.* 308).

Thus, seizing goods of another under a lawful distress for rent or damage feasant is lawful.

(5) *Legal Authority.*—Due process of law is a good justification.

Thus to take goods under a *ca. sa.*, or to destroy or seize goods under the order of a court, is justifiable.

Possession. Rule 58.—To maintain an action for trespass or conversion, the plaintiff must be the person in actual or constructive possession of the goods (*Smith* v. *Miller*, *T. R.* 480).

Thus a reversioner cannot sue a third party for *trespass or conversion* (*Bradley* v. *Copley*, 1 *C. B.* 685); conversely, the person in possession of a chattel, although not the owner, may maintain trespass in respect of it, *ex. gra.*, the master of a ship (*Moore* v. *Robinson*, 2 *B. & Ad.* 817).

Possession follows Title. Sub-rule (1). — *A legal right to the possession of personalty draws to it the possession* (*Balme* v. *Hutton*, 9 *Bing.* 477).

(1) Thus where the person in temporary possession (as a carrier) delivers my goods to the wrong person, then, as the immediate right to the possession of them becomes again vested in me, so the law immediately invests me with the possession, and I can maintain an action for them against either the bailee or the purchaser (*Cooper* v. *Willomat*, 1 *C. B.* 672; *Wild* v. *Pickford*, 8 *M. & W.* 443).

(2) So where a bailee became bankrupt, and his assignees sold the goods, the bailor was held entitled to sue them for a conversion (*Fenn* v. *Bittleston*, 7 *Ex.* 152).

(3) **Sale of Property under Lien.** And so when by a sale of goods the property in them has passed to the purchaser, subject to a mere lien for the price, if the vendor resells and delivers them to another he will be liable for conversion, but in such a case the plaintiff will only be entitled to recover the value of the goods, less the sum for which the defendant had a lien upon them (*Page* v. *Edulgee*, *L. R.*, 1 *C. P.* 127; *Martindale* v. *Smith*, 1 *Q. B.* 389).

(4) And on the same principle an administrator may maintain an action for trespass to goods, which trespass was committed previously to his grant of letters of administration (*Thorpe* v. *Smallwood*, 5 *M. & G.* 760).

(5) So a trustee having the legal property may sue in respect of goods, although the actual possession may be in his cestui que trust (*Wooderman* v. *Baldock*, 8 *Taunt.* 676).

What Possession suffices. Sub-rule (2).—*Any possession is sufficient to sustain an action for trespass or conversion against a wrongdoer.*

(1) Thus in the leading case of *Armory* v. *Delamirie* (1 *Sm. L. C.* 315), it was held that the plaintiff, the finder of a jewel, could maintain an action of trover against a jeweller to whom he had shown it, with the intention of selling it, and who had refused

to return it to him; for his possession gave him a good title against all the world except the true owner.

(2) So also in *Elliott* v. *Kempe* (7 *M.* & *W.* 312), it was laid down that the fact of possession is *primâ facie* evidence of the right to possession, and therefore sufficient to maintain trespass against a wrong-doer who cannot show a better title, or authority under a better title.

Therefore a defendant cannot set up a *jus tertii* against a person in actual possession. But where the possession of the plaintiff is not actual, but only constructive, the defendant may set up a *jus tertii*, for constructive possession depends upon a good title, and if the title be bad there can be no constructive possession (see *Leake* v. *Loveday*, 4 *M.* & *G.* 972).

Reversioner's Remedy. Sub-rule (3).—*The person entitled to the reversion of goods may maintain an action of trespass on the case for any permanent injury done to them* (*Tancred* v. *Allgood*, 28 *L. J., Ex.* 362; *Lancas. Waggon Co.* v. *Fitzhugh*, 30 *L. J., Ex.* 231.)

Thus where the plaintiff, the owner of a barge, let it to A., and whilst in A.'s possession and during the continuance of the lease it was permanently injured by a third party (the defendant): it was held that an action lay by the plaintiff, although he could not have sued for conversion (*Mears* v. *L.* & *S. W. R. Co.*, 11 *C. B., N. S.* 854).

In the same case, Williams, J., says, "It is fully established that in the case of a bailment not for reward, either the bailor or bailee may bring an

action for an injury to the thing bailed; but in the case of a hiring the owner cannot bring trover, because he has temporarily parted with the possession. It seems to me, however, clear that though the owner cannot bring an action where there has been no permanent injury to the chattel, it has never been doubted that where there is a permanent injury the owner may maintain an action against the person whose wrongful act has caused that permanent injury."

Joint Owners. RULE 59.—A joint owner can only maintain trespass or conversion against his co-owner when the latter has done some act inconsistent with the joint-ownership of the plaintiff (2 Wms. Saund. 47 o).

(1) Thus a complete destruction of the goods would be sufficient to sustain an action, for the plaintiff's interest must necessarily be injured thereby.

(2) But a mere sale of them by one joint owner would not be a conversion, for he could only sell his share in them. Unless, indeed, he sold them in market overt, so as to vest the whole property in the purchaser, in which case it would be a conversion (*Mayhew* v. *Herrick*, 7 *C. B.* 229).

Trespass ab initio. Rule 60.—If one, lawfully taking a chattel not absolutely, abuses or wastes it, he renders himself a trespasser ab initio (*Oxley* v. *Watts*, 1 *T. R.* 12).

Thus if one find a chattel it is no trespass to keep it as against all the world except the right owner, but if one spoil or damage it, and the right owner eventually claim it, then the subsequent damage will revert back, and render the original taking unlawful (*Ibid.*). But, as against the true owner, a man commits no conversion by keeping the goods until he has made due inquiries as to the right of the owner to them (*Vaughan* v. *Watt*, 6 *M. & W.* 492; *and see Pillott* v. *Wilkinson*, 34 *L. J., Ex.* 22).

Remedies. There are four forms of remedy for the preceding trespassers by action, and one peculiar one by act of the person injured called—

1. Recaption. Rule 61.—When any one has deprived another of his goods or chattels the owner of the goods may lawfully reclaim, and take them wherever he happens to find them, so it be not in a riotous manner or attended with breach of the peace (*Bl. Comm.*).

Thus if, for instance, my horse is taken away, and I find it in an inn or on a common, or at a fair, I may retake it, but (unless it was feloniously stolen) I cannot break open a private stable for the purpose (*Ibid.*; *and Higgins* v. *Andrews*, 2 *Roll. R.* 55).

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2. **Action of Trespass.** The general remedy by action for all direct interferences with property is by this action.

RULE 62.—The foundation of an action of trespass is an actual taking of or any direct or immediate injury to goods (*Leame* v. *Bray*, 3 *East*, 593; *Bull. & L.* 414).

The action for trespass is generally, however, employed rather for injuries to and interference with another's goods than for the detention of them, for which the form most generally adopted is that of—

Trover and Conversion. This action originally lay only to recover damages against a person *finding* and converting to his own use the plaintiff's goods; it was, however, subsequently extended by a legal fiction to all cases where a man had wrongfully got possession of the goods of another and refused to re-deliver them.

RULE 63.—The foundation of an action of trover is some act of the defendant repudiating the owner's right, or some exercise of dominion inconsistent with it (*Ballard, Prec.* 291).

This may be not only by taking the goods but by destroying them or parting with them (as in market overt), or using them (*Fouldes* v. *Willoughby*, 8 *M.*

& W. 540; *Johnston* v. *Stear*, 33 *L. J., C. P.* 130); or by purchasing and taking possession of them, the vendor having no legal title to them, and it matters not that the purchaser was ignorant of this (*Bull. & L.* 291; *and see Hilberry* v. *Hatton*, 33 *L. J., Ex.* 190).

As this action only sounds in damages where the return of the actual goods is sought for, the remedy is by—

Action of Detinue. This action lies for the specific recovery of the goods, or if they are destroyed or lost, their value in money.

Rule 64.—The foundation of an action of detinue is the wrongful detention of goods, and not the wrongful conversion or taking (*Bull. & L.* 312).

It is immaterial, therefore, in this action, whether the goods were lawfully or wrongfully obtained, so that at the time of action brought the plaintiff has a right to them. It is, therefore, not only applicable to conversion but also to certain other injuries, some arising partly ex contractu and some quasi ex contractu.

Sub-rule.—*It is no excuse in detinue that the defendant has lost the possession of the goods through his own act or neglect* (*Reeve* v. *Palmer*, 27 *L. J., C. P.* 327; 28 *Ib.* 168).

And by the Common Law Procedure Act, 1854, sect. 78, the court or a judge has power to order that execution shall issue for return of the chattel detained, without giving the defendant the option of paying the assessed value instead; and if the chattel cannot be found, then when the court or judge shall otherwise order, the sheriff shall distrain the defendant by all his goods and chattels in his bailiwick till the defendant renders such chattel.

Replevin. The fifth remedy is, practically speaking, applicable only in cases of goods unlawfully distrained, and is called replevin.

This action is somewhat similar in its results to the preceding one, being brought for the restitution of the goods and damages for their detention.

Rule 65.—The owner of goods distrained is entitled to have them returned upon giving such security as the law requires to prosecute his suit, without delay, against the distrainer, and to return the goods if a return should be awarded. (See 19 & 20 Vict. c. 108, ss. 63—66.)

The application for the replevying or return of the goods is made to the registrar of the county court of the district where the distress was made, who thereupon causes their return on the plaintiff's

giving sufficient security. The action must be commenced within one month in the county court, or within one week in one of the superior courts; but if the plaintiff intends to take the latter course it is also made a condition of the replevin bond that the rent or damage in respect of which the distress was made exceeds 20*l.*, or else that he has good grounds for believing that the title to some corporeal or incorporeal hereditaments, or to some toll, market, fair, or franchise, is in dispute (19 & 20 Vict. c. 108, s. 95).

Waiver of Tort. Rule 66.—When a conversion consists of a wrongful sale of goods the owner of them may waive the tort, and sue by a count for money had and received for the price which the defendant obtained for them (*Lamine* v. *Dorrell*, 2 *L. Raym.* 1216; *Oughton* v. *Seppings*, 1 *B. & Ad.* 241).

(1) Thus where the sheriff took in execution the goods of a bankrupt which had vested in the assignees by reason of a previous act of bankruptcy, and sold them after notice of the act of bankruptcy, the assignees were held entitled to recover the price obtained for the goods by the sheriff as money paid to their use (*Notley* v. *Buck*, 8 *B. & C.* 160).

(2) And so where some stock of the plaintiff's was sold by a member of the defendant's firm under a forged power of attorney, and the firm received the

money for which it had been sold, it was held that the plaintiff could recover the money as paid to his use (*Marsh* v. *Keating*, 1 *Bing., N. C.* 198).

Sub-rule.—*But by waiving the tort the plaintiff estops himself from recovering any damages for the wrong.*

Thus he cannot claim the money received under a wrongful sale, and also claim damages in respect of the tort itself (*Brewer* v. *Sparrow*, 7 *B. & C.* 310).

Stolen Goods. Rule 67.—If any person who may have stolen property is prosecuted to conviction by or on behalf of the owner, the property shall be restored to the owner, and the court before whom such person shall be tried shall have power to order restitution thereof (24 & 25 Vict. c. 96, s. 100).

Therefore, even if the goods were sold by the thief in market overt (which at common law gives an indefeasible title to the purchaser), yet by this section they must be given up to the original owner; and where no order is made under the act, yet the act revests the goods and gives the owner a right of action for them (*Scattergood* v. *Silvester*, 19 *L. J., Q. B.* 447).

Indirect Torts to Personalty. Beside the torts affecting personal property mentioned above there are a great many for which, not being forcible and direct wrongs or conversions, an action of trespass is not applicable; such are indirect injuries arising from negligence; injuries to chattels arising from fraud and deceit, and many others, all of which are grounds for an action, and in some cases an injunction to prevent the continuance of the wrong.

Of them all it may be predicated—

RULE 68.—Whenever a right has been infringed, or a damage caused by breach of duty under such circumstances as render an action of trespass or trover inapplicable, an action of trespass on the case will lie; for *ubi jus ibi remedium est.*

(1) **Negligent keeping of Fire.** Thus, if through my negligence (but not otherwise) a fire breaks out in my house, and spreads to my neighbour's and consumes his house and goods, an action will lie against me for the consequential damages so sustained by him (*Tilliter* v. *Phippard*, 11 *Q. B.* 357; *Vaughan* v. *Menlove*, 3 *B. N. C.* 468).

(2) And so if a railway company allows dead grass or other combustibles to accumulate along their line, and such combustibles became ignited by the sparks from their engines, and the fire spreads and injures an adjoining proprietor's property, the company will be liable (*Freemantle* v. *L. & N. W. R. Co.*, 31 *L. J., C. P.* 12. *See L. R.*, 3 *Q. B.* 733).

(3) So if one mix innocent ingredients together, and form an explosive compound, he is liable for all consequential damages caused by an explosion (*Tindal, C. J., in Vaughan* v. *Menlove, sup.*).

(4) Instances also present themselves in the case of the negligence of bailors and bailees, but such wrongs are rather wrongs ex contractu than ex delicto.

Limitation. Rule 69.—All actions of trespass, detinue, trover and replevin for taking away of goods and cattle, and all actions upon the case for loss of or damage to goods and chattels, must be commenced within six years next after the cause of action arose.

The rules laid down in Chapter IV., Part I., with reference to the commencement of the period, must be remembered in connexion with this rule, as it is sometimes questionable at what period the conversion took place.

CHAPTER X.

Of Infringements of Trade Marks and Patent and Copyright.

Class of Rights. Besides injuries to person, reputation, liberty, or property, there are also injuries which cannot, perhaps, strictly speaking, be ranged under any of these heads.

There are very many rights belonging to individuals of which it is impossible to treat in any single work, much less in a work of this kind; and therefore of these it is sufficient to say, that where they are infringed the law will always supply a remedy, in accordance with the maxim *ubi jus ibi remedium est.*

But there are three instances of rights so important that they demand some special elementary notice to be taken of them, even in a small work. Such are the rights incident to a trade mark, patent right, and copyright.

Section 1.

Imitation of Trade Mark.

And, first, of trade marks, which are the symbols by which a man causes his goods or wares to be identified and known in the market.

RULE 70.—A man who has adopted a trade mark, in order to designate a particular article, has a right to the assistance of a court of equity to prevent any one from so using the same as to induce purchasers to believe, contrary to fact, that they are buying that particular article to which the mark was originally supplied (*Farina* v. *Silverlock*, 26 *L. J.*, *Ch.* 11).

(1) Thus where A. introduces into the market an article, which, though previously known to exist, is new as an article of commerce; and has acquired a reputation in the market by a name, not merely descriptive of the article; B. will not be permitted to sell a similar article under the same name (*Braham* v. *Bustard*, 1 *H.* & *M.* 449).

(2) And so also in *McAndrew* v. *Bassett* (33 *L. J.*, *Ch.* 561) the plaintiffs had manufactured liquorice which they stamped with the word "Anatolia;" and it was held, that, though this was but the name of a place, yet a property in it could be acquired when it had been notoriously applied to a vendible commodity.

(3) And so where the omnibuses of an omnibus proprietor were marked with particular figures and devices, an injunction was granted to restrain an opposition omnibus proprietor from adoping similar figures and devices (*Knott* v. *Morgan*, 2 *Keen*, 219).

Assignment of. Sub-rule.—*Although a trader may have a property in a trade mark, sufficient to*

give him a right to exclude all others from using it; if his goods derive their increased value from the personal skill or ability of the adopter of the trade mark, he will not be allowed to assign it; for that would be a fraud upon the public (*Leather Cloth Co.* v. *Am. Leather Cloth Co.*, 1 *H. & M.* 271).

But it seems that if the increased value of the goods is not dependant upon such personal merits, the trade mark is assignable (*Bury* v. *Bedford*, 33 *L. J., Ch.* 465).

This is but reasonable, for in many instances a trade mark may be of great value, although it is no guarantee of personal ability in the manufacturer; for it may indicate a particular brand of goods which from mere habit people buy in preference to any other. In such a case the sale of a trade mark is somewhat analogous to the sale of the goodwill of a business, or still more to that of the practice of a professional man.

Remedies for Infringement of Trade Marks. Rule 71.—At law the proper remedy is by an action for deceit, and proof of fraud is of the essence of that action; but the Court of Chancery will act on the principle of protecting property alone, and it is not therefore necessary for the party applying for the injunction, to prove fraud (*Edelston* v. *Edelston*, 1 *De G., J. & S.* 185, and see 25 & 26 Vict. c. 88, s. 22).

Thus the court will grant a perpetual injunction against the use by one tradesman of the trade mark of another, although such mark has been used in ignorance of its being any person's property, and under the belief that it was mere technical or fancy decoration (*Millington* v. *Fox*, 3 *Mylne & C.* 338).

I may here suggest that in case the Judicature Bill now before the House of Commons shall become law, the difference in this respect between the principles of law and equity will be abolished; and in reversal of the old maxim, law will in this instance follow equity.

Exception. Selling Articles under Vendor's own Name.—Where a person sells an article with his own name attached, and another person of the same name sells a like article with his name attached, an injunction will not be granted to prevent such last-named person from doing so, unless it be proved that he does it with the fraudulent intention of palming his goods upon the public, as being those of the plaintiff (*Burgess* v. *Burgess*, 22 *L. J., Ch.* 675; *Sykes* v. *Sykes*, 3 *B. & C.* 541).

Section 2.

Infringement of Patent Right.

Patent Right. A patent right is a privilege granted by the Crown (by letters patent) to the first inventor of any new manufacture or invention, that he and his licensees shall have the sole right, during

the term of fourteen years, to make and vend such manufacture or invention.

The right is created and defined by various statutes, the first of which was 21 Jac. 1, c. 3, usually called the Statute of Monopolies. The rule laid down by that Act was as follows:—

RULE 72.—All letters patent for the term of fourteen years or under, by which the privilege of sole working or making any new manufactures within this realm, which others at the time of granting the letters patent shall not use, shall be granted to the true and first inventor thereof; so as they be not contrary to law nor mischievous to the state, nor to the hurt of trade nor generally inconvenient.

It will be seen that the rule limits the grant of letters patent to the concurrence of four conditions: viz. (1) that the article must be a manufacture, (2) that it must be new, (3) that the patentee must be the true and first inventor, and (4) that it be of general public utility.

What is a Manufacture. A manufacture, according to the derivation of the word, means some article made by hand; but this is hardly the sense in which it is used in the rule.

Sub-rule (1)—"*The word manufacture has been generally understood to denote either a thing made which is useful for its own sake, and vendible as such, as a medicine, a stove, a telescope, and many*

others; or to mean an engine or instrument, or some part of an engine or instrument, to be employed either in the making of some previously known article, or some other useful purpose; or it may perhaps extend also to a new process to be carried on by known implements, or elements, acting upon known substances, and ultimately producing some other known substance, but in a cheaper or more expeditious manner, or of a better and more useful kind" (Abbott, C. J., *R.* v. *Wheeler*, 2 *B.* & *Al.* 349).

The latter part of this sub-rule has since been taken out of the regions of conjecture, and expressly confirmed (*Crane* v. *Price*, 4 *M.* & *G.* 580).

Thus a patent for the omission merely, of one or more of several parts of a process, whereby the process may be more cheaply and expeditiously performed, is valid (*Russell* v. *Cowley*, 1 *Webst. R.* 464).

Newness of Manufacture. Sub-rule (2).—*The manufacture must be new, and such as others at the time of the granting of the letters patent shall not use in this realm.*

(1) Therefore if the article be new in this realm, but not new elsewhere, it is yet the subject for a valid patent; for the object of letters patent is to give a species of premium for improving the manufactures, not so much of the world, as of the United Kingdom (*Beard* v. *Egerton*, 3 *C. B.* 97).

(2) An invention is not new if it be merely the application of an old machinery to a new result; and this holds if any material *part* of the alleged new inven-

tion be old: for the grant of the monopoly is entire, and cannot be separated; and therefore if one part fails, the whole fails (*Losh* v. *Hague*, 1 *Webst. R.* 207, per Lord Abinger).

If the invention has been discovered before, but kept secret by the inventor, it does not render the patent of a subsequent inventor of it invalid; for it is new so far as the public are concerned (*Carpenter* v. *Smith*, 1 *Webst. R.* 534, per Lord Abinger).

Meaning of true and first Inventor. Sub-rule (3).—*If the invention has been communicated to the patentee, by a person in this country, he cannot claim to be the true and first inventor; but if he has acquired the knowledge of the invention abroad, and introduces it here, the law looks upon him as the true and first inventor* (*Lewis* v. *Marling*, 10 *B. & C.* 22; *Edgebury* v. *Stephens*, 2 *Salk.* 447).

The reason of this sub-rule is, that it is immaterial as far as regards the good of the kingdom, whether a man has acquired knowledge of the manufacture, by study, observation, or travel (2 *Steph. Comm.* 27).

The manufacture in respect of which the patent is claimed must be new in every part; for if one part of the so-called new invention is old the patent will be void (*Losh* v. *Hague*, 1 *Webst. R.* 203).

I do not mean by this, however, that there cannot be a new application to an old machine; but in such a case, the old machine is not considered to be part of the new manufacture.

General Public Utility. Sub-rule (4).—*The*

community at large must receive some benefit from the invention (Ad. 53).

The reason of this condition is obvious, for an useless invention not only does not merit the premium of a monopoly, but what is worse, prevents other inventors from improving upon it.

Thus if one produces old articles in a new manner, such new way must, in some way, be superior to the old method, in order to support a patent; for otherwise the old method is as good as the new. But if the article is produced at a cheaper rate by the new machine, or in a superior style, it is a good ground for a patent.

Specification. As the object of letters patent is to give the benefit of an invention to the public at large, instead of allowing it to remain a secret in the hands of the inventor; it follows that the nature of the invention must be declared by the inventor.

Rule 73.—The letters patent are always granted upon the condition, that they shall be void unless a sufficient description of the nature of the invention and the mode of carrying it into effect (so as to enable ordinarily skilful persons to practise and use it at the end of the term of fourteen years) shall be filed in the Court of Chancery, within a specified time (15 & 16 Vict. c. 83, s. 27).

Thus if the specification (as the description is called) be ambiguous, insufficient or misleading, it will render the patent void (*Simpson* v. *Holliday*, *L. R.*, 1 *H. L.* 315; *Savory* v. *Price*, *Ry. & Mo.* 1); unless the ambiguity, variation or imperfection, be slight and immaterial, when it will not avoid the patent (*Gibbs* v. *Cole*, 3 *P. Wms.* 255).

Remedy for Infringement. RULE 74.—A court of law may award damages, and also grant an injunction, and order an account for the infringement of a patent; and a court of equity may do the same (15 & 16 Vict. c. 83, ss. 41 & 42; *Penn* v. *Jack*, *L. R.*, 5 *Eq.* 81).

Of course the defendant in any such action or suit, may plead the invalidity of the patent, on the grounds of want of novelty, utility, that the patentee is not the first and true inventor, that the article is not the subject for a patent, &c.: or he may plead that his manufacture is different from that of the plaintiff; but in such a case he must show, that the general idea and fashion of his invention, is different to that of the plaintiff; for it may be, that the machinery for making the manufacture, is not of the essence of, but only incidental to, the manufacture (*Boulton* v. *Watt*, 2 *H. Bl.*, per Eyre, C. J.; *Jupe* v. *Pratt*, 1 *Webst. R.* 146).

Such is a slight sketch of the law relating to patents, which is, however, of so vast a character, that it almost forms of itself a separate branch of jurisprudence. Let us now pass on to the law of copyright.

Section 3.

Of Infringement of Copyright.

Copyright is the exclusive right which an author possesses of multiplying copies of his own work.

It seems to be doubtful whether copyright existed at common law, but, however that may be, it is *now* positively defined and settled by statute.

The first act on the subject was 8 Ann. c. 19, (afterwards amended by 15 Geo. 3, c. 53, and 41 Geo. 3, c. 107,) by which the exclusive right of printing and reprinting was given to the author and his assigns for the term of fourteen years and no longer; provided that if the author should be living at the expiration of that period, the period should be extended to him for another term of fourteen years.

Common Law Right. It was long doubted whether, supposing the author to have a common law copyright, these statutes abridged it; but at length this was set at rest by the celebrated case of *Donaldson* v. *Beckett* (4 Burr. 2408), by which it was decided, that if any such right did exist at common law, it was nevertheless taken away by the statutes. And at the same time the majority of the judges expressed an opinion, that at common law the right

of publishing and republishing his works belonged to the author and his assigns for ever.

The next act was 54 Geo. 3, c. 156, which extended the period to twenty-eight years; and if the author should be still living at the expiration of that period, to the residue of his natural life.

Law at present Time. All these acts, however, are now repealed by 5 & 6 Vict. c. 45.

Rule 75.—(1) The copyright in a book published in the author's lifetime shall belong to the author and his assigns during the life of the author, and seven years after his death. Provided that, if such period of seven years shall expire before the end of forty-two years from the first publication of such book, the copyright shall in that case endure for such period of forty-two years (5 & 6 Vict. c. 45, s. 3).

(2) And also the copyright in a work published subsequently to the author's death, shall belong to the proprietor of the manuscript for the term of forty-two years from the first publication (Ibid.).

(3) The proprietor of copyright commencing after the passing of that act, (10th June, 1833,) shall not sue or proceed for any infringement of his copyright before making an entry of it at Stationers' Hall (sect. 11).

Exception. Immoral Works.—There is no copyright in libellous, fraudulent or immoral works (*Stockdale* v. *Onwhyn*, 5 *B. & C.* 173; *Southey* v. *Sherwood*, 2 *Mer.* 435).

So where a work professes to be the work of a person other than the real author, with the object thereby to induce the public to pay a higher price for it, no copyright can be claimed in it (*Wright* v. *Tallis*, 1 *C. B.* 893).

Meaning of Book. Sub-rule.—*The word book includes every volume, part and division of a volume, pamphlet, sheet of letter-press, sheet of music, chart, map or plan separately published* (sect. 2).

(1) Thus there may be copyright in the wood engravings of a work, for they are part of the volume (*Bogue* v. *Houlston*, 5 *De G. & Sm.* 267).

(2) So also copyright may subsist in part of a work, although the rest may not be entitled to it (*Low* v. *Wood*, *L. R.*, 6 *Eq.* 415).

(3) But it seems that copyright is not claimable in a single word, as the title of a magazine; "Belgravia" for instance (*Maxwell* v. *Hogg*, *L. R.*, 2 *Ch.* 207).

What is Piracy of Copyright. Rule 76.—The act that secures copyright to authors, guards against the piracy of the words and sentiments, but it does not prohibit writing on the same subject (per Mansfield, C. J., *Sayre* v. *Moore*, 1 *East*, 359).

(1) Thus, in the above case, Lord Mansfield further directed the jury, that the question for them was, "whether the alteration be colorable or not; there must be such a similitude, as to make it probable, and reasonable to suppose, that one is a transcript, and nothing more than a transcript. In the case of prints, no doubt different men may take engravings from the same picture. The same principle holds with regard to charts. Whoever has it in his intention to publish a chart, may take advantage of all prior publications. There is no monopoly here, any more than in other instances; but upon any question of this kind, the jury will decide, whether it be a servile imitation or not. If an erroneous chart be made, God forbid it should not be corrected, even in a small degree, so that it thereby becomes more serviceable and useful."

(2) And even where a great part of the plaintiff's work has been taken into the defendant's, it is no infringement, so that the defendant has so carefully revised and corrected it, as to produce an original result (*Spiers* v. *Browne*, 6 *W. R.* 352); or, if it was fairly done with the view of compiling a useful book for the benefit of the public, upon which there has been a totally new arrangement of such matter (per Ellenborough, C. J., *Cary* v. *Kearsley*, 4 *Esp.* 170).

Honest Intention no Excuse. Sub-rule.—*If, in effect, the great bulk of the plaintiff's publication—a large and vital part of his labour—has been appropriated, and published in a form that will mate-*

rially injure his copyright; mere honest intention on the part of the appropriator will not suffice (per Wood, V.-C., *Scott* v. *Stanford, L. R.*, 3 *Eq.* 723).

What is Piracy of Music. Thus, with respect to music, if the whole air be taken it is a piracy, although set to a different accompaniment, or even with variations; for the mere adaptation of the air, either by changing it to a dance, or by transferring it from one instrument to another, does not, even to common apprehensions, alter the original subject. The ear tells you that it is the same substantially; the piracy is, where the appropriated music, though adapted to a different purpose from that of the original, may still be recognized by the ear (*D'Almaine* v. *Boosey*, 1 *Y. & C., Ex.* 288, per Lyndhurst). But, on the other hand, where one composed and published an opera in full score, and after his death B. arranged the whole opera for the piano, it was held that this was an independent musical composition, and no piracy (*Wood* v. *Boosey*, *L. R.*, 3 *Q. B., Ex. Ch.* 223).

Plays founded on Novels. To produce the incidents of a novel, in the form of a play, is no infringement of copyright, unless the play be printed, or unless the novel was founded on a play, of the copyright of which the author was owner (see *Read* v. *Conquest*, 30 *L. J., C. P.* 209; *Tinsley* v. *Lacy*, 32 *L. J., Ch.* 535; *and Reade* v. *Lacy*, 30 *L. J., Ch.* 655).

Remedies. RULE 77.—Any person causing a book to be printed for sale or exportation, without the written consent of the proprietor of the copyright; or who imports for sale such unlawfully printed book; or with a guilty knowledge sells, publishes, or exposes for sale or hire, or has in his possession for sale or hire, any such book without the consent of the proprietor, shall be liable to a special action on the case at the suit of the proprietor, to be brought within twelve calendar months. And an injunction may be also obtained, to restrain the further infringement.

(1) Thus an injunction may be granted to restrain a person from printing the unpublished works of another (*Prince Albert* v. *Strange*, 1 *Mac. & Gor.* 25). And an action at law may also be maintained for the same cause (*Mayall* v. *Higby*, 6 *L. T., N. S.* 362).

(2) An injunction will also be granted, if a person under colour of writing a review copies out so large and important a portion of the work as to interfere with the sale of it; but a reasonable amount of quotation, in order to review the work properly, is allowable (*Campbell* v. *Scott*, 11 *Sim.* 31; *Bell* v. *Walker*, 1 *Bro. Ch. C.* 450).

Penalties. Besides the remedy by action and injunction, there is also a quasi-criminal remedy in the case of *imported* piracies, by means of penalties.

These do not take away the remedy by action or injunction, but are cumulative upon them (sect. 17, and see page 23.)

Copyright in Oral Lectures, Dramas, and Works of Art. Besides the copyright in literary works, there is also a copyright in various other productions.

Such are oral lectures, dramatic compositions, engravings, prints, lithographs, drawings, paintings, photographs, and sculptures and models. In a work like the present, space will not permit me to do anything more than sketch out the main heads of the rights of individuals in respect of these productions.

The publication of oral lectures, except those delivered in colleges, &c., is prohibited by 5 & 6 Will. 4, c. 65, without the author's consent; but in order to have the benefit of this act, the lecturer must give previous notice to two justices of the peace.

Right of Representation of Dramatic and Musical Works. The right of *representing* dramatic and musical compositions is vested in the author or composer, and his assigns, for the same period as in literary compositions, by 5 & 6 Vict. c. 45, s. 20, which also imposes penalties upon any person performing them without the written leave of the author or composer. These penalties are not cumulative, but only alternative.

Assignment of Copyright does not include Right of Representation. I may mention, that

the assignment of the copyright of a book containing dramatic or musical compositions is only an assignment of the right of multiplying copies of it, and not of the right of representing it (sect. 22), unless at the time of registering the assignment the same is expressly stated. But a mere assignment of the right of representation does not seem to require registration (*Lacy* v. *Rhys*, 22 *L. J., Q. B.* 157).

Engravings. Engravings are protected by the statutes 8 Geo. 2, c. 13; 7 Geo. 3, c. 38; and 17 Geo. 3, c. 57.

Sculpture. Sculptures and models by 38 Geo. 3, c. 71, and 54 Geo. 3, c. 56.

Designs. Useful and ornamental designs by "The Copyright of Designs Act, 1858," "The Designs Acts," 1842, 1843 and 1850, and "The Protection of Inventions Act, 1858."

Works of Art. Paintings, drawings and photographs by 25 & 26 Vict. c. 68.

Conclusion. Here this summary statement of the law relating to torts must conclude. In compiling it, my design has been throughout to present to the reader an intelligible and orderly arrangement of the principles upon which the law depends.

It must not be imagined that I put forth this work as in any way a digest of the subject, far from it.

Were a digest alone wanted, nothing more could be desired than Mr. Addison's exhaustive treatise. I only claim for this the place of a guide book or manual, in which will, I think, be found all that is needful in the ordinary every-day practice of a solicitor's business.

Neither must the student imagine that such injuries as are not named in this or any other treatise are therefore not remediable by the law, for wrongs are infinitely various. Let him in such cases recollect the observation of Cicero, "Erat enim ratio profecta a rerum naturâ, et ad recte faciendum impellens, et a delicto avocans: quæ non tum denique incipit lex esse cum scripta est, sed tum, cum orta est."

Lastly, although it has been my chief endeavour to render the work accurate and trustworthy, yet, to conclude in the words of Littleton, "I will not that thou believe that all I have said is law, for that will not I take upon me nor presume; but of those things that be not law, inquire and learne of my wise masters learned in the law. Notwithstanding that certain things that be noted and specified be not law, yet such things shall make thee more apt and able to understand, and learne the arguments and the reasons of the law: for by the arguments and reasons in the law, a man may more sooner come to the certaintie and to the knowledge of the law."

FINIS.

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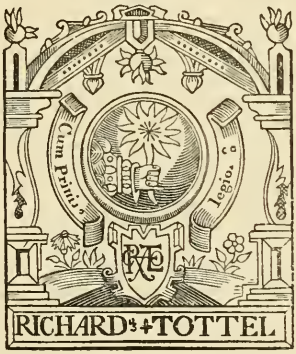

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